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IN THE
APPELLATE COURT
FOURTH DISTRICT
February Term, 1945

Term No. 4308

Agenda No. 2.

THE PEOPLE OF THE STATE OF
ILLINOIS, Upon the relation of
F. J. GROFF, CLAUD COLLINS,
CHARLES KUYKENDALL, FRANK
RAWLINSON and L. R. MEDOFF,
Directors of Grayville Community
High School District No. 182,

Original Plaintiffs-Appellants,

vs.

THE BOARD OF EDUCATION OF CROSS-
VILLE COMMUNITY HIGH SCHOOL
DISTRICT NO. 120, in the County
of White and State of Illinois,

Original Defendant-Appellee.

326 I.A. 33

Appeal from the

Circuit Court of

White County,

Illinois.

BRISTOW, P. J.

This is a proceeding in quo warranto brought by The People of the State of Illinois upon the relation of the Directors of Grayville Community High School District No. 182, hereafter referred to as the Grayville District, against the Board of Education of Crossville Community High School District No. 120, hereafter referred to as the Crossville District, in regard to the right to exercise jurisdiction over certain tracts of land claimed by each of said Districts, to be legally included within its boundaries.

In People vs. The Board of Education, 383 Ill. 166, which cause was transferred to this Court, will be found a statement of facts, part of which we will not repeat.

On October 29, 1941, a petition was filed in the office of the County Superintendent of Schools of White County, Illinois, for the organization of the Grayville District.

On October 31, 1941, three parts bound together as one petition were filed in the office of the same Superintendent of Schools, asking that certain contiguous non-high school territory be detached from non-high school territory and be attached to said Crossville District.

The three parts of this petition filed, one describing nineteen sections of land, one two sections and one a small tract, were identical in wording except as to the description of the land. Each stated that "We, the undersigned, being a majority of the legal voters residing in the following territory, to-wit," then described the territory and then proceeded as follows: "And, also, we the undersigned, being a majority of the legal voters residing in Community High School District No. 120, * * * * do hereby petition you to detach the above described territory from said non-high school district and attach the same to said Crossville Community High School District No. 120, in said County of White and State of Illinois; that said described territory is compact and contiguous and is adjacent to said Community High School District No. 120." The signers to each petition were the majority of the legal voters in the described territory, and, following the three parts as attached together, were the signers of a majority of the legal voters in the entire Crossville District Territory.

One point relied upon by Appellants, is, that this document filed as one petition, failed to comply with the Statute in that it was three petitions and not "a petition".

At 9:27 A.M. on November 29, 1941, the County Superintendent of Schools of White County, complied with the statutory required procedure, and filed with the County Clerk of said county, a map of the described territory. It will thus appear that this was done within the thirty day limitation period. Appellees contend that the filing of this petition and map was an annexation of said land to the Crossville District.

The lands described in the petition to be annexed were

included within the lands described in said petition filed October 29, 1941, to establish the Grayville District. After the annexation petition was filed, and after November 10th following, the County Superintendent of Schools called an election on the Grayville petition, and set said election for November 29, 1941, to begin at one o'clock P. M. thereof. At this election the majority of the votes cast were in favor of establishing the Grayville District.

At the time in question, the statutory provision for detaching lands of a non-high school territory and attaching same to an existing Community High School District, did not require any vote on the question. To organize a community high school district on a petition filed for such purpose, a vote was required.

The chief point of dispute and contention in this case is whether, by virtue of Section 89b of the Illinois School Laws, the filing of a petition to organize the Grayville District, rendered inoperative the petition filed two days later for annexation.

The provisions of the Statute relied upon, quoted, argued and cited by counsel are Sections 89a, 89b, 89c, and 96a State Bar Stat. 1941, Chapter 122, entitled "Schools".

Section 89a contains the provision for the filing of a petition to establish a community high school. It provides for the calling of an election, form of ballot, for or against "The establishment of a community high school", and later the calling of an election of a board of education, and the organization of the board. Section 89c provides that when such petition is filed with the county superintendent of schools, that he and the Superintendent of Public Instruction shall study the territory of the proposed district, high schools needs and conditions, and the area adjacent, and if the Superintendent of Public Instruction finds the proposed district is not compact and contiguous, a notice is published, no election is held and no further proceedings are had.

Section 96a, which was enacted several years after Section

89a, and after Section 89b was amended, provides that when "a petition" is filed with the county superintendent of schools, signed by a majority of legal voters of non-high school territory, and also signed by a majority of the legal voters of an adjacent community high school district, to detach such compact and contiguous territory from the non-high school territory and to attach same to the adjacent high school district, that "said territory shall be detached from said non-high school district and added to said community or township high school district, and it shall be the duty of said county superintendent of schools, within thirty days after said petition is filed with him as aforesaid, to make and file with the county clerk of his county a map showing the new and added boundaries of said community or township high school district as requested in said petition, and from the filing of said map in the office of the county clerk as aforesaid said territory detached * * * * shall be a part and parcel of said community high school district."

Only recently, since the filing of briefs in this cause, our Supreme Court decided the case of *People ex rel. Simpson vs. Funkhouser et al* 385 Illinois 386. In our opinion this decision conclusively disposes of the issues of law involved in the instant case. It was there held that a proceeding under Section 89a takes precedence over one subsequently commenced under section 96a; that to hold otherwise produces confusion and chaos and arrogates to the county superintendent of schools extreme authority not contemplated by the legislature. Following this authority, we are compelled to hold that the Board of Education of Crossville Community No. 120 is without any authority to exercise jurisdiction over the tracts of land in dispute and that the Grayville Community High School District No. 182 is a valid and duly organized high school district.

Accordingly, this cause is reversed and remanded with

directions that judgment be entered ousting the Board of Education of the Crossville District from its purported jurisdiction over the territory in controversy.

REVERSED AND REMANDED

Abstract.

FILED

APR 25 1945

Stanley B. Brown

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

43338

HARRY DANISON,
Appellee,
v.
DOROTHY BROSMORE,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

3201.1.34

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant Dorothy Brosmore appeals from a judgment in the sum of \$2,405 entered against her in an action on a promissory note dated August 5, 1939 for the principal sum of \$1,940, payable 2 years after date with interest at 6 per cent, signed by herself, Rudolph H. Bendler and Charles Bendler, his father.

Defendant denied the execution of the note, and upon the trial, at the close of plaintiff's evidence, amended her answer by adding the defense of want of consideration. No reply was filed to this amendment, but defendant offered testimony in support of the defense and is therefore held to have waived the reply. Cairo Lumber Co., Inc. v. Ladenberger, 313 Ill. App. 1, 12.

Evidence offered on behalf of the plaintiff shows that plaintiff and Rudolph Bendler were lifelong friends; that in July of 1939 Rudolph, with defendant, to whom he was then engaged, went to plaintiff's home and requested a loan of \$2,500 from plaintiff; that defendant offered to sign the note with Rudolph, it being the intention of the parties to use the money in the purchase of a home; that plaintiff told Rudolph he would let him have whatever money he had in the bank; that on August 5th plaintiff met Rudolph and Charles Bendler at the latter's place of employment and gave Rudolph \$1,940, receiving the note sued upon which was then signed by Charles and Rudolph Bendler, with the

Plaintiff, Charles Bendler, vs. Defendant, Rudolph Bendler.

Case No. 12345

Division of the Court

On the 1st day of January, 1934, the Plaintiff, Charles Bendler, filed a complaint against the Defendant, Rudolph Bendler, for the recovery of a sum of money. The complaint alleges that the Defendant, Rudolph Bendler, is a person of ill repute and has been guilty of various acts of fraud and deceit. The Plaintiff, Charles Bendler, claims that he has been defrauded by the Defendant, Rudolph Bendler, and is entitled to the recovery of the sum of money claimed in the complaint. The Defendant, Rudolph Bendler, denies the allegations of the Plaintiff, Charles Bendler, and claims that he is entitled to the sum of money claimed in the complaint. The court has heard the evidence of both parties and has rendered its decision in favor of the Plaintiff, Charles Bendler, and has awarded him the sum of money claimed in the complaint. The court has also ordered the Defendant, Rudolph Bendler, to pay the costs of the litigation.

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understanding that it was to be later signed by defendant; that defendant and Rudolph bought the property, taking title in joint tenancy under a deed dated August 12, 1939, and were later married; that at a dinner given at their home sometime in the fall of 1939 (the exact date being in dispute), plaintiff, defendant, Rudolph and Charles Bendler retired to a bedroom where plaintiff produced the note for defendant's signature; that after discussion, arising from her inquiry as to whether she should sign the note in her married name or use her name of August 5th, the date of the note, she signed as Dorothy Brosmore, apologized for the delay in affixing her signature, and returned the note to plaintiff. Nothing was ever paid on account of the note. On July 7, 1943 defendant testified in a divorce proceeding brought by her against her husband in Cook county and a decree was subsequently entered, defendant waiving alimony and solicitor's fees. Litigation is now pending in the Circuit court of Cook county in respect to the property purchased in 1939. July 27, 1943 action on the note was commenced and service of summons had on defendant and Charles Bendler. The latter filed no answer and was called as a witness by plaintiff.

Defendant denies having been at the home of plaintiff prior to her marriage with Rudolph; that any conversation was ever had with respect to a loan or any promise made by her to sign a note. She denies that she received any part of the consideration of the note and says that the cash payment of \$2,000 made when the property was purchased was insurance money received by her on the death of her former husband and taken from the safety deposit box of her mother in the Continental bank on Saturday, August 5 or 12, 1939. She denies signing the note or having had any conversation with plaintiff regarding it. Her specific denial of the transaction alleged to have occurred in the home of plaintiff at the time of the dinner party is supported in part by the testimony

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of her mother, sister, brother and a friend.

Plaintiff offered the testimony of a handwriting expert who, after comparison of defendant's alleged signature on the note with a number of signatures admitted to be genuine, testified that the signature on the note was, in his opinion, written by the defendant. Defendant, assuming the role of a handwriting expert, pointed out certain alleged variations between the signature on the note and the genuine signatures and testified that she never signed her name as it appeared on the note. The questioned signature and those admitted to be genuine were submitted to the jury. There are various facts and circumstances in the record tending to impair the credibility of some of the witnesses offered by plaintiff and defendant, including themselves. The credibility of the witnesses and the weight to be given the testimony of each were primarily matters to be determined by the jury. Their finding has been approved by the trial court and we cannot say that it is against the manifest weight of the evidence. Therefore, we cannot disturb it. Carroll v. Krause, 295 Ill. App. 552, 565.

The jury has accepted plaintiff's version of the transaction, that \$1,940 was delivered to Rudolph Bendler and the note of himself and father taken with the understanding that defendant would also sign the note as she had formerly agreed. No further consideration was needed to support the signature of defendant, affixed to the note several months later. Commercial State Bank of Forreston v. Folkerst, 200 Ill. App. 385, 389; Cook v. Parker, 71 P.2d (Cal.) 591, 593. Defendant complains that the adding of Charles Bendler, as the maker of the note, created an obligation different from that alleged to have been entered into by herself and Rudolph and plaintiff at the latter's home before any money was paid. Having signed the note without objection to the

of a mother, sister, brother, and so on.

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signature of Charles Bendler thereon, she cannot now object.
The alleged variance urged by defendant is without merit.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

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signatures of Charles Lewis Johnson, the co-defendant.
The alleged variance urged by defendant is without merit.
The judgment is affirmed.

APPROVED

WATSON and O'CONNOR, JJ., concur.

43350

MICHAEL BRAUN and GLENEMAY BRAUN,
Appellants,

v.

JULIA MANASTER,
Appellee.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued, filing a complaint designated "assumpsit". Defendant moved to strike the complaint and dismiss the action. The motion to strike was sustained. Plaintiffs did not ask leave to file an amended complaint. The action was dismissed with judgment, and plaintiffs appeal.

The question to be determined is whether the complaint stated a cause of action. The complaint does not conform to the requirements of an action in assumpsit at common law. That was not necessary. The Civil Practice Act (Smith Hurd Anno. Stat., Chap. 110) with rules of the Supreme Court, made pursuant thereto, are controlling. Section 33 (1), par. 157, provides:

"All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense or reply."

Subsection (3) of the section provides that pleadings shall be construed liberally "with a view to doing substantial justice between the parties".

We have considered this pleading in a conformity with this rule. It is neither plain nor concise. We hold it does not state a cause of action on any theory.

The facts we gather from the complaint are that on June 25, 1942, plaintiffs subleased from defendant a building of six

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furnished apartments to be used as a rooming house. They also purchased from the former tenant a business of that kind conducted there. Defendant knew and plaintiffs say they did not know the building was badly in need of repairs. Plaintiffs say they inquired of defendant about the physical condition of the building and that it was the duty of defendant to tell them the truth; that defendant did not tell plaintiffs the truth, "but defendant desiring the building reconstructed at plaintiffs' expense, and intending, contriving to wrongfully, maliciously cheat and defraud plaintiffs, advised plaintiffs the building in good repair, well knowing statement false and building not in good repair". Plaintiffs, however, say they made a casual inspection "which did not disclose inner timbers of structure supporting windows under rear porches honeycombed with rot, shaky and deteriorated". Plaintiffs, relying and trusting defendant, purchased furnishings and business of former tenant, "invested life savings and entered into a lease with defendant, agreeing to pay her \$225.00 month, for term expiring June 30th, 1945".

The complaint goes on to state: "At execution of lease and purchase of business of former tenant, the rear porches of building enclosed with glass and occupied by tenants in late spring, summer and early fall for sleeping --- in winter for storage." The pleading continues: "September 1st, 1943, defendant served demand that plaintiffs rebuild porches, a portion of building stated in good condition. Rebuilding of porches glassed in, extensive alteration, not a repair. Plaintiffs offered to pay a portion but offer refused. September 15th, 1943, defendant entered premises, removed glassed in porches, and erected open porches, not serviceable for sleeping or storage and increased cost of heating by lack of protection from cold and charged cost to plaintiffs' account."

turnished apartments to be used as a home. They also
purchased from the former tenant a business of 100 and 100
there. Defendant knew and plaintiff say they did not know the
building was badly in need of repairs. Plaintiff say they intended
of defendant about the physical condition of the building and that
it was not of defendant to tell them the truth; that defendant
did not tell plaintiff the truth, that defendant wanted the
building reconstructed at a high expense, and that they, con-
triving to work this, maliciously told and caused plaintiff
advised plaintiff the building in poor repair, well knowing
statement false and building not in poor repair". Plaintiff
however, say they made a casual inspection which did not disclose
inner condition of structure supported by windows under repair
longer than the roof, eaves and gutters. Plaintiff say they
and trusting defendant, purchased furniture and fixtures of former
tenant, "invested life savings and entered into a lease with
defendant, agreeing to pay her \$100.00 monthly for ten years
June 30th, 1948".

"The complaint goes on to state: "At expiration of lease
and purchase of business of former tenant, the new porch of
building enclosed with glass and a canopy by concrete in late
spring, summer and early fall for sleeping -- in winter for storage".
The pleading continues: "September 1st, 1948, defendant entered
demand that plaintiff rebuild porch, a portion of building stated
in good condition. rebuilding of porch glassed in, extensive
alteration, not a repair. Plaintiff offered to pay a portion out
after refused. September 15th, 1948, defendant entered pleading,
removed glassed in porch, and erected open porch, not service-
able for sleeping or storage and increased cost of heating by lack
of protection from cold and charged cost to plaintiff's account."

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The complaint also says: "At execution of purchase of leasehold, plaintiffs agreed to pay defendant \$225.00 monthly rental and deposited \$750.00 guaranty payment of rent. Defendant knew by wrongful acts plaintiffs' earnings substantially reduced but wrongfully evicted plaintiffs for failure rebuild patches, retaining deposit received from plaintiffs. Plaintiffs damaged in loss rentals, \$450.00, deposit, \$750.00, loss of profits, \$2500." The pleader does not state the total amount of his demand, which a computation shows to be the sum of \$3700.00.

It is manifest from this pleading that a lease of some kind was executed; that plaintiffs went into possession of the premises; that defendant put them out, whether for legal cause does not appear.

Plaintiffs were in possession for fifteen months and the rent due for this occupancy under the agreement would amount to \$3,375.00. Whether any part of it was paid during that time is not stated. For aught we can tell from this pleading, the amount deposited was insufficient to pay the rent due and unpaid.

Plaintiffs say they lost \$450.00 "rentals". What rentals, from whom due and for what time of occupancy, the pleading leaves us to guess. This comes a long way from being clear and concise pleading.

Plaintiffs also ask \$2500.00 for loss of profits. Again we are left to conjecture. Certainly this cannot be supposed to be any action in the nature of common law assumpsit. Apparently the pleader did not have assumpsit in his mind at all.

It seems more probable plaintiffs intended to state a cause of action for fraud and deceit. If so, from this standpoint, also, the pleading is inadequate. It is insufficient to allege fraud and deceit as mere conclusions. This is elementary. In order to state a cause of action for fraud and deceit the specific acts or facts must be stated from which the fraud appears. Carroll v.

The complaint also says: "At execution of purchase of leasehold, plaintiff agreed to pay defendant \$150.00 monthly rental and deposited \$700.00 guaranty payment of rent. Defendant then by wrongful sale plaintiff's earnings substantially reduced but wrongfully evicted plaintiff for failure to pay rent, retaining deposit received from plaintiff. Plaintiff's damages in loss of rental, \$450.00, deposit, \$700.00, loss of profit, \$100.00. The pleader does not state the total amount of his demand, which a computation shows to be the sum of \$1,250.00. It is manifest from this pleading that a loss of some kind was executed; that plaintiff's rent into possession of the premises; that defendant's rent was not, whether for legal cause does not appear.

Plaintiff's were in possession of the premises and the rent due for this occupancy under the agreement would amount to \$2,375.00. Whether any part of it was paid during that time is not stated. For aught we can tell from this pleading, the amount deposited was insufficient to pay the rent due and unpaid. Plaintiff says the lost \$450.00 "rental". The rental, from when due and for what time of occupancy, the pleading leaves us to guess. This covers a long way from being clear and concise pleading.

Plaintiff also says \$250.00 for loss of profit. Again we are left to conjecture. Certainly this cannot be assumed to be any action in the nature of common law assumption. Apparently the pleader did not have assumption in his mind at all.

It seems more probable plaintiff intended to state a cause of action for fraud and deceit. If so, from this standpoint, also, the pleading is inadequate. It is insufficient to allege fraud and deceit as mere conclusions. This is elementary. In order to state a cause of action for fraud and deceit the specific acts or facts must be stated from which the fraud appears. Carroll v.

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Hastings, 259 Ill. App. 564; Ravlin v. C. A. & DeKalb R. R. Co., 297 Ill. 130; Davis v. Wirth, 249 Ill. App. 544.

Plaintiffs, however, say the trial judge did not consider their right to waive the tort and sue in assumpsit. They cite Arnold v. Dodson, 272 Ill. 377. Manifestly, plaintiffs could not waive an action they failed to state at all. Arnold v. Dodson does not help them. The opinion in that case holds that a party defrauded by a contract may rescind the contract and sue in assumpsit. Plaintiffs here do not state a case on that theory. They do not allege a rescission of the contract. On the contrary, they allege they entered into possession of the premises and held them for fifteen months. They did not return any consideration. They kept everything received. On no theory suggested can it be held that this pleading states a cause of action of any kind, whether contract, express or implied, or in tort.

The judgment will be affirmed.

AFFIRMED.

Niemeyer, P. J., and O'Connor, J., concur.

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Hastings, 208 Ill. App. 3d; Harley v. J. A. & J. A. Co., 208 Ill. App. 3d.

Ill. 189; Davis v. Smith, 208 Ill. App. 3d.

Plaintiff, however, says the trial judge did not consider

their right to waive the tort and sue in contract. They also

Arnold v. Johnson, 272 Ill. 378, 189 Ill. 378, 189 Ill. 378, 189 Ill. 378.

waive an action they failed to waive at all. Arnold v. Johnson

not help them. The opinion is that case holds that a party

debarred by a contract may rescind the contract and sue in

contract. Plaintiff here do not waive a tort or contract.

They do not allege a rescission of the contract. On the contrary,

they allege they entered into possession of the premises and held

them for fifteen months. They did not return the premises.

They kept everything received. On the other hand, can it be

held that this pleading states a cause of action of any kind,

whether contract, express or implied, or in tort.

The judgment will be affirmed.

ALLIED.

Winey, P. J., and O'Conor, J., concur.

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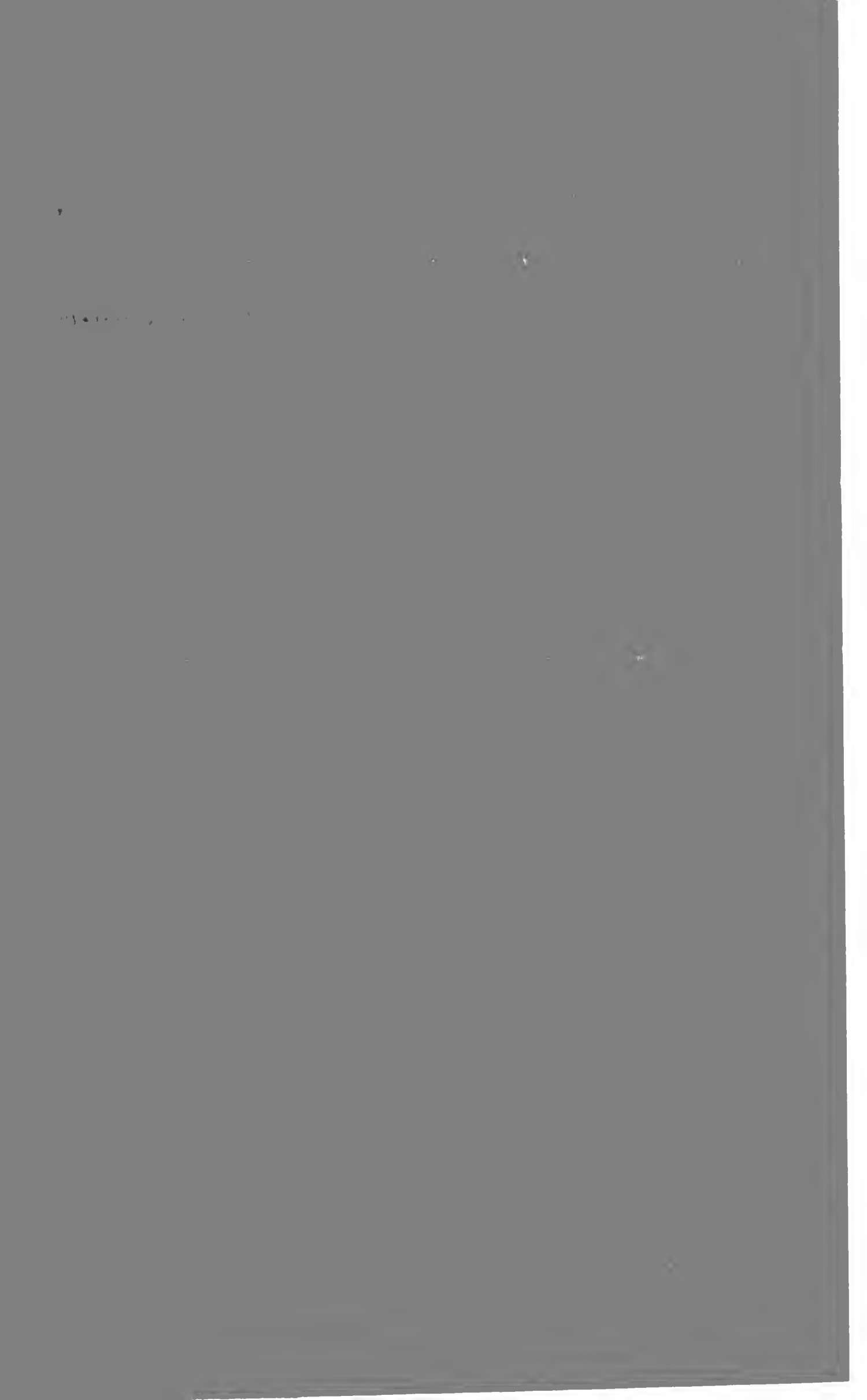
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" Except that the evidence in this case is not official and that the evidence is not stand on par with the evidence with the edge of the evidence and with the current of the edge of the evidence had no application to the obvious this center of parking his car to the left side of the road and he received the evidence we are of opinion that the reason, the judgment that the evidence is not official.

Defendants further state that they failed to follow the instructions to give 3 instructions per subject, and that the substance of each of the instructions was not as good as the instructions of





43310

L. A . DUBSKY,
Appellee,
v.
CHARLES STERN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

320 L.A. 36

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of forcible detainer against defendant to recover possession of an apartment on the first floor of a building located at 2227 South Ridgeway avenue, Chicago. There was a hearing before the court without a jury, a finding and judgment in plaintiff's favor and defendant appeals.

The suit was commenced July 7, 1944 and the summons returnable July 17; a pluries summons returnable September 5, 1944, was served on defendant on September 2. September 13, defendant's appearance was entered by his counsel and on the same day they filed a verified motion that the cause be continued until September 19, on the ground that the wife of plaintiff was subpoenaed to appear as a witness but refused to do so; that she lived with her husband and family at Fox River Grove, Illinois, where they had resided more than 20 years and that neither she nor her husband had any intention of moving from their home; that it was sought to have her brought before the court or that defendant be given an opportunity to take her deposition. The motion, supported by an affidavit of Albert Schwartz, the authorized agent of defendant, further set up that defendant, who was a material witness, was absent from the jurisdiction of the court and would not return until September 19, 1944, and further, that the affiant believes that defendant, if present, would testify that he rented

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the apartment in question ^{three} 3 years prior, to provide a home for Mallika Orosi, who was the companion for many years, of defendant's mother before her death, and her devoted friend; that between January 1, 1944 and May 1, 1944, defendant had numerous conversations with James J. Dvorak, who purported to be plaintiff's agent, in which conversations Dvorak indicated that he disliked the occupants of the apartment because of their alleged personal habits, in failing to keep the premises clean, and for these reasons he wanted the occupants to vacate the apartment; that in none of these conversations was it stated that the apartment was desired by plaintiff for occupancy. The affidavit further set up that plaintiff's counsel had no opportunity to confer with defendant in connection with the preparation of the affidavit and therefore was unable to furnish dates, or the exact context of the conversations.

So far as the record discloses, the motion was not passed upon but the trial went to hearing on September 13. In response to a question by the court as to whether defendant was ready he replied: "if these affidavits are admitted, we are ready today." Counsel for plaintiff then said that for the purpose of the hearing plaintiff would admit that if Stern were present he would testify to the matters mentioned in the affidavit.

The record discloses that on May 5, 1942, plaintiff, "per James J. Dvorak, Agent," entered into a written lease with defendant "Charles Stern of 151 E. Chicago Ave. Chicago" whereby the apartment was rented for the period commencing May 1, 1942, and ending April 30, 1943, at a rental of \$60 per month, payable in advance. One of the blank spaces of the lease was filled in by typing the following: "It is further understood and agreed that the premises herein noted shall be occupied by four adult women and one child, namely, Mrs. Bessie Kosman, Louise Kosman, Marika Orosi, Gertrude Pankes and daughter Mary Louise, and no other;"

The first part of the paper is devoted to a general discussion of the problem. It is shown that the problem is of great importance in the theory of the structure of the universe. The second part of the paper is devoted to a detailed study of the problem. It is shown that the problem is of great importance in the theory of the structure of the universe. The third part of the paper is devoted to a detailed study of the problem. It is shown that the problem is of great importance in the theory of the structure of the universe. The fourth part of the paper is devoted to a detailed study of the problem. It is shown that the problem is of great importance in the theory of the structure of the universe. The fifth part of the paper is devoted to a detailed study of the problem. It is shown that the problem is of great importance in the theory of the structure of the universe. The sixth part of the paper is devoted to a detailed study of the problem. It is shown that the problem is of great importance in the theory of the structure of the universe. The seventh part of the paper is devoted to a detailed study of the problem. It is shown that the problem is of great importance in the theory of the structure of the universe. The eighth part of the paper is devoted to a detailed study of the problem. It is shown that the problem is of great importance in the theory of the structure of the universe. The ninth part of the paper is devoted to a detailed study of the problem. It is shown that the problem is of great importance in the theory of the structure of the universe. The tenth part of the paper is devoted to a detailed study of the problem. It is shown that the problem is of great importance in the theory of the structure of the universe.

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and further, that the rent should be paid directly to the lessor or his agent, by the lessee.

February 18, 1944, plaintiff's agent, who was also his son-in-law, and lived next door to the premises in question, wrote defendant a letter in which it was stated: "This is to advise you that the owner of the building located at 2227 S. Ridgeway Ave. in which you have leased the first flat, wishes to occupy the flat on May 1st., 1944;" and asking that the apartment be vacated by April 30th, 1944. February 24, defendant wrote Mr. Dvorak, the agent, from "151 East Chicago Avenue" saying: "This is to advise you that I am ready, desirous and able to sign a lease for the first apartment, 2227 South Ridgway Avenue, Chicago, for the year commencing May 1, 1944, on the same terms as the current year.

"I cannot recognize your notice dated February 18, 1944, because it is not in compliance with the O.P.A. Maximum Rent Regulation." April 6, 1944, Dvorak wrote a letter addressed to defendant at "151 E. Chicago Ave." in which he stated: "On February 18th you were notified as follows:" Then follows a copy of the letter of February 18, above mentioned, and the letter continues: "Further, please be advised that this notice is in accordance with the O.P.A. rent regulation, a copy of which is being sent to the Office of Price Administration for the Chicago Area." Written on the bottom of this letter appears "Note ^{See} -- This is a copy of second notice sent to Chas. Stern, signer of lease for the year 1942 ^{See} / no lease was signed for the year 1943."

Wilmetta Spier, called by plaintiff, testified that she was employed as stenographer for plaintiff's counsel, that May 31, 1944, she went to 151 East Chicago avenue and there saw Miss Krapock at the Cinema Theater and asked for Mr. Stern, the defendant, and was told he was not in; that she then left a copy of a notice with Miss Krapock. The notice was addressed to defendant at 151 East Chicago avenue, and signed by plaintiff, by his agent,

~~4.~~
Mr. Dvorak, and by plaintiff's counsel. It was in the usual printed form and stated that plaintiff had elected to terminate your tenancy of the apartment in question. The following was typed in a blank space: "Apartment No. One (1) on the First floor of the building located at 2227 So. Ridgeway Ave., Chicago, Illinois. 1. The owner wishes to occupy the flat. 2. On termination of lease, occupants were subtenants; no part of premises used by tenant as his own dwelling;" that the termination would take effect on the 30th of June, 1944, and defendant will be required to deliver up possession on that date.

James J. Dvorak who signed the lease on behalf of plaintiff testified that he sent the letter of February 18th to Mr. Stern by registered mail at the only address he knew, 151 East Chicago avenue; that he had also sent the letter of April 6th to Mr. Stern at the same address. He further testified that plaintiff and his wife, Mrs. Dubsky, were his father and mother-in-law, and lived at Fox River Grove, Ill.; that they owned the building in which the apartment was located and that he was their agent. That both of them were in the 70's and in poor health; that the daughter, who lived with the parents was not well, and there was no doctor in Fox River Grove; that he had but one conversation with plaintiff between January 1, 1944 and May 1, 1944, which was in the hallway of the building 2227 So. Ridgeway; that Mrs. Dvorak was present; that Mr. Stern said he intended to stay and would not move; that he offered the witness more rent; that Stern asked him if the people could not stay in the apartment and the witness said: "no, the folks wanted the apartment." That he never complained of the character of the persons living in the apartment or the condition in which it was kept, and that he had not been in the apartment.

Some of this evidence was objected to by counsel for defendant as immaterial and that plaintiff and his wife and daughter were available and could appear as witnesses; that the witnesses

5.
should not be allowed to testify as to their frame of mind; and that the health of plaintiff and his wife and daughter was very poor.

Mrs. Dvorak, called by plaintiff, testified that she lived with her husband at 2225 So. Ridgeway avenue and that plaintiff was her father; that her mother was suffering from a heart and kidney affliction; that her father was senile and not very responsible; that the mother was able to get around at home but was not able to climb stairs very well and that she wanted them near her in the apartment in question, so as to help take care of them.

Henry Stern, defendant's brother, testified that defendant had ceased to be manager of the theater on Chicago avenue 3 or 4 years ago and had ceased business on account of a severe heart attack. That the witness was manager of the theater and president of the corporation which operated it. That he did not recall Miss Krapeck because they had so many different people working for them; that she may have been cashier for a short time; that he did not recall her name; but if she was there she was employed by the witness; that his brother Charles, the defendant, comes into the office of the theater at 151 East Chicago avenue at no regular time; had no official connection with it; that he would drop in occasionally to see a picture or to have lunch.

On cross-examination he testified that he did not think his brother had a telephone listed in the directory under his own name and did not have an office at the theater; no headquarters there; that "He is not associated with us," but formerly had been; "he doesn't get any official mail there any more, because he is not there. Some letters come to him from people who know he was associated there at one time."

Earl Danenburg, called by defendant, testified that about April 22, 1944, which was Saturday, he had a conversation with Mrs. Dubsky at her home in Fox River Grove, having been sent

there by his employer, Mr. Albers, who operated a private detective agency. It was about noon; that he was in the kitchen where Mrs. Dubsky was getting the meal. She said she was Mrs. Dubsky and had lived there for about 18 or 20 years and that they were not going to move; that that was her home; that defendant employed the agency to make the investigation. On cross-examination he testified that he did not ask her whether she wanted to rent her home; she said it was not for sale. That he afterward talked to Mr. Novak, a real estate man in Fox River Grove, who told him he had no knowledge that the Dubskys were intending to move.

Mrs. Gertrude Pankes, one of the persons for whom the apartment was rented, as mentioned in the lease, testified that the apartment was rented for her mother, herself, her sister, her little daughter, and Mallika Orosi, an elderly lady who had been housekeeper for defendant's mother for 45 years; that the witness was to take care of Mallika Orosi for the exact amount of the rent; that Mallika Orosi was in ill health; that the first of September, as she was leaving the apartment for work she met Mrs. Dvorak who asked her when they were going to get out of the apartment and asked the witness if Mr. Stern didn't tell them they were to be out of the flat; they were supposed to move; that she replied: "I know you told us in May you wanted us to move and I have been trying to get another place. There is nothing to be had and Mr. Stern even put an ad in the west side newspaper," for an apartment; that she had not been able to get in touch with defendant because he had been very sick; that Mrs. Dvorak said: "You are supposed to be out by October 1st, because we are going in October 1st."

The court then indicated he was going to decide for plaintiff but on account of the absence of defendant (who would not be available to give the necessary bond for appeal until he returned

7.
September 19) the matter was continued until that date when judgment for possession was entered in plaintiff's favor.

It is conceded by counsel for both parties that under the regulations of the Office of Price Administration, under the facts disclosed by the evidence, plaintiff was not entitled to maintain this action unless he was to occupy the premises for himself and his family.

~~(Plaintiff)~~ Counsel for defendant contend that the evidence is insufficient to show that plaintiff and his family, in good faith, intended to occupy the apartment and further, that the notice of May 31, from which we have above quoted, was not served on the defendant, Stern, but was left with Miss Krapock at the theater building at 151 East Chicago avenue when Stern was no longer connected with the theater and for some time prior thereto had not been connected with it and had no office at this place; while on the other side, counsel for plaintiff says that the service of the notice was sufficient, and among other things points to the fact that on February 24, 1944, Stern wrote the letter from 151 East Chicago avenue to Mr. Dvorak, which is evidence that he was located at the premises at that time. But the difficulty with this contention is that the 30 day notice of May 31, was not served for nearly 3 months after the letter of February 24. The evidence without contradiction shows that Stern was in a bad state of health and had not been connected with the theater for some time, except to drop around there occasionally. We think the evidence of the service of the notice was insufficient and we are further of opinion that the evidence as to whether plaintiff and his family intended to occupy the apartment is also insufficient, Ryerson v. Bankers' Life Ass'n, 183 Ill. App. 194, and cases there cited: California, etc. Co. v. Union, etc. Co., 126 Calif. 433; and that the finding of the court to the contrary is against the

~~8.~~
manifest weight of the evidence.

(8) Defendant further contends that plaintiff was not the owner of the building in which the apartment was located. We think this contention cannot be sustained. The title to the premises was in plaintiff's name. The evidence shows it was sold to him in 1932 by his son-in-law, Mr. Dvorak, who testified that before the conveyance he owned the property and then sold it to his father-in-law, but that he "did not entirely divest myself of all interest in the property;" that he owed his parents-in-law moneys and gave them the title; that when he paid back all that he owed them, he would have the right to have the property conveyed back to him. Plaintiff and defendant having executed the lease, and possession having been taken by the 5 persons mentioned in the lease, we think defendant ought not now be permitted to say that plaintiff could not maintain an action for forcible detainer.

The judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED. - []

91 Niemeyer, P. J., and Matchett, J., concur.

43331

CHARLES C. HOFFMAN, JR., WILLIAM
BART and SALLIE PRIES,
Appellants,

v.

BURNETT CENTRAL BUILDING, INC., a
Corporation, and A. S. KIRKEBY, O.
F. BURNETT and JOHN H. SCHWARZ,
Individually and as officers and
directors of said corporation,
Appellees.

APPEAL FROM
SUPERIOR COURT
OF COOK COUNTY.

36²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiffs seek to reverse a decree of the Superior court of Cook county finding that the equities of the case were with the defendants and dismissing the complaint for want of equity.

August 8, 1944, plaintiffs, Charles C. Hoffman, Jr., who owned 11 shares, and William Bart, who owned 84 shares of the common stock of the defendant, Burnett Central Building, Inc., (which he acquired a few days before suit) filed their complaint in chancery against the Building Corporation and its officers and directors, namely, A. S. Kirkeby, O. F. Burnett and John H. Schwarz praying, (1) that an order be entered restraining defendants from proceeding with a meeting of the stockholders of the Building Corporation scheduled to be held August 9, 1944; (2) that the court restrain defendants from using any of the shares of stock which defendants had "purchased at \$30 per share" at the meeting and (3) upon a final hearing the court find that the defendant officers and directors had conducted the business of the Building Corporation in a fraudulent manner; that the purposes of the Corporation could no longer be accomplished, that it

CHAMBERLAIN, J. W. (aka),
and others, et al.
Defendants.

v.

COMMONWEALTH OF MASSACHUSETTS,
Superior Court, and the
Attorney General, et al.
Plaintiffs.

of this is to say that the
Superior Court of this Commonwealth
case with the defendant in this
case of equity.

August 9, 1944, Plaintiff, Charles F. Johnson, Jr., who
owned 17 shares, and 1111 1/2 shares of the
common stock of the defendant, Charles F. Johnson, Jr.,
(which no longer a part of the defendant's stock).

in character, against the Building Corporation and its officers
and directors, namely, J. W. Chamberlain, et al., and John A.
Robertson, Jr., (1) that a motion for summary judgment be
granted free of charge with a finding of the stock of the

Building Corporation admitted to be held by the
that the court herein should be from using any of the
of stock which defendant had "conveyed at 100 per cent" as
the meeting and (2) upon a final hearing the court find that the

defendant officers and directors had conducted the business of
the Building Corporation in a fraudulent manner; that the purpose
of the Corporation could no longer be accomplished; that it

2.

should be dissolved and the property sold "at not less than the guaranteed bid;" that the funds be distributed to the stockholders and that the defendants' officers and directors be prevented from receiving any proceeds as the result of their purchase of the stock of the Building Corporation, etc.

By leave of court, on August 10, plaintiffs filed an amendment to the complaint in which Sallie Fries, who was alleged to be the owner of 5 shares of stock in the defendant Building Corporation, was made an additional party plaintiff. And an additional prayer was added that the resolution of the stockholders of the Building Corporation passed August 9, 1944, be declared illegal and void, etc.

The record discloses that the defendant Building Corporation owned a building which was constructed in 1925, in the north part of Evanston, and which it leased for dormitory purposes, at a rental of \$36,000 a year to the National College of Education, a charitable institution which conducts a school nearby. The building when constructed, was subject to a large mortgage and during the depression there was a reorganization so that stocks and bonds were issued to the bondholders whose bonds were secured by a trust deed on the building. And in 1935 the Building Corporation leased the building to the college for a period of 5 years at a rental of \$12,000 per year. In 1940 this was renewed the lease expiring in 1947, at the same rental of \$12,000 per year. The Building Corporation proposed to sell the building which was its only asset and to distribute the proceeds to the parties entitled thereto and to cease doing business.

Conrad H. Poppenhusen, a lawyer who had been practicing law for many years in Chicago, was the chairman of the board of trustees of the college, and negotiations were begun between the Building Corporation and the college looking towards the sale of the

3.

building to the college. He was called by plaintiffs and testified that he was chairman of the board of trustees of the college for 15 years and in its behalf bought about 800 shares of the stock of the Building Corporation. When he was approached by defendant Kirkeby, of the Building Corporation, with reference to the sale of the building he stated that the college did not have any money at the time but if he were given a little time he might see if some of the "angels" of the college might be willing to donate money with which to buy the building. He testified further that he donated \$5,000, Mr. Norman D. Harris \$10,000, Mr. Sutherland \$5,000, Mrs. Amos Ball and Mrs. Cross \$3,000 each and that he used this money to buy stock of the Building Corporation, the proposed sale of it to the college having been rejected at a special meeting of the stockholders of the Building Corporation by reason of the fact that less than two-thirds of the shares of stock had been voted in favor of selling the building for \$75,000 and that afterward, through negotiations, he purchased the stock of the Building Corporation for the college paying \$30 a share, and the agreement with the representatives of the Building Corporation was that \$30 a share would be paid to any other stockholders who desired to sell his stock.

He further testified that there was no agreement when he purchased the 800 shares of stock from the officials of the Building Corporation that they would resign as officers and directors of the Building Corporation but that it was understood that when these officials sold out their interest they would resign and the stockholders would then elect new directors in their stead.

The evidence further is to the effect that if the building were sold for \$75,000 it would net the shareholders \$18 per share and that a few days after the proposed sale of the building for \$75,000 failed there were further offers for the stock and Mr. Poppenhusen offered on behalf of the college, \$30 a share. There

to the college. He was asked by the witness and testified that he was chairman of the board of trustees of the college for 15 years and in the month of August 1910, he was approached by the stock of the Building Corporation, which was incorporated by defendant, and the Building Corporation, with reference to the sale of the building he stated that the college did not have any money at the time but it was given a little time to might see if some of the "members" of the college might be willing to donate money with which to buy the building. He testified further that he donated \$1,000, the college donated \$10,000, and defendant \$5,000, and the college sold \$10,000 worth of stock that he used this money to pay a part of the \$10,000 for the building, the proposed sale of it to the college having been rejected at a special meeting of the stockholders of the Building Corporation by reason of the fact that less than two-thirds of the shares of stock had been voted in favor of selling the building. For \$75,000 and that afterward, through negotiations, he was able to purchase the stock of the Building Corporation for the college a certain \$30 a share, and the agreement was that the representatives of the Building Corporation were that \$30 a share would be paid to any other stockholders who desired to sell their shares. He further testified that there was no agreement, and he purchased the 300 shares of stock from the officials of the Building Corporation that they would resign as officers and directors of the Building Corporation but that it was understood that when these officials sold out their interest they would resign and the stockholders would then elect new directors in their stead. The evidence further is to the effect that in the building were sold for \$75,000 it was not the shareholders \$15 per share and that a few days after the proposed sale of the building for \$75,000 failed there were further offers for the stock and Mr. Poppenhausen offered on behalf of the college, \$30 a share. There

4.

had been 3 offers of \$75,000 for the building. The evidence further shows that the building was especially appropriate for a dormitory for the college.

Most of the evidence is shown by the record of the minutes of the Building Corporation. Defendants offered no evidence but at the close of plaintiffs' case the court entered the decree from which this appeal is taken.

The theory of plaintiffs is that defendants, the officers and directors of the Building Corporation were guilty of fraudulent conduct in disposing of their shares of stock to Mr. Poppenhusen, who represented the college, and as a part of the transaction in the sale of the stock they agreed to resign as directors of the Building Corporation so that new directors might be elected by the stockholders who would then be controlled by the college.

We have considered all the evidence in the record and there is little or no conflict or inconsistency in it. It is all substantially uncontradicted. We will not stop to analyze the argument of plaintiffs' counsel to the effect that the evidence shows there was a fraudulent scheme by the defendants' officers and directors of the Building Corporation, for we are clearly of opinion that the argument is wholly unwarranted. The defendants' officials and the others who sold their stock in the Building Corporation were endeavoring to get the most they could for their stock and there is no word of evidence nor argument of counsel that the price paid for the stock was not what it was really worth. There is no evidence of the value of the building nor any argument made on that ground.

The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Niemeyer, P. J., and Matchett, J., concur.

had been 3 years of 1911, 1912 for the building. The evidence further shows that the building was essentially appropriate for a school-

factory for the college.

Part of the evidence is shown in the record of the minutes

of the Building Corporation. Statement of what is shown in the record

at the close of the building, and the record shows the record

from which this report is taken.

The theory of the building is that the building was

and the record of the building is shown in the record of the minutes

which is shown in the record of the minutes.

For example, the record shows the building was a part of the

transaction in the sale of the building and the record shows

discovery of the building was made in the record of the minutes

as shown by the record of the building and the record shows

the college.

We have considered all the evidence in the record and there

is little or no conflict of testimony in it. It is all sub-

stantially uncontradicted. It is all in accord with the statement

of plaintiff's counsel to the effect that the evidence shows there

was a fraudulent scheme by the defendants to defraud the college

of the Building Corporation, for the use of the college and

the argument is wholly uncontradicted. The defendants' officials

and the others who sold their stock in the Building Corporation

were endeavoring to get the stock sold for their stock and

there is no word of evidence nor argument of counsel that the price

paid for the stock was not what it was really worth. There is no

evidence of the value of the building nor any significant case on that

ground.

The decree of the Superior Court of Cook County is affirmed.

DECEMBER AFFIRMED.

WISSEY, J. J., and MACHETT, J. J., concur.

1823A

Abstract

Gen. No. 10002

Agenda No. 2

In the Appellate Court of the
State of Illinois

Second District

February Term, A. D. 1945.

In the Matter of the Estate
of Walter S. Vanderwater,
Deceased.

City National Bank of Kanka-
kee, as Executor of the Last
Will and Testament of Walter
S. Vanderwater, Deceased,
Appellee,

v.
Richard S. Vanderwater,
Appellant.

Appeal from the
Circuit Court of
Kankakee County.

326 I.A.

Dove, P. J.:

Walter S. Vanderwater died testate on January 30, 1930. His will, dated March 29, 1929, was admitted to probate, and the City Trust and Savings Bank, of Kankakee, was appointed executor by the county court of Kankakee County on March 4, 1930. On October 11, 1937, certain objections by appellant to current reports and to the final report of the executor, as amended, were sustained, and all his other objections were overruled. Both parties appealed to the circuit court, where the appeals were consolidated, and on January 1, 1940, the cause was referred to a special master to report his findings of fact and conclusions of law. Appellee and the executor bank were affiliates, housed in the same building, with practically the same officers, directors and stockholders. The two banks were merged on April 20, 1940, and it was stipulated that appellee succeeded to all the rights and liabilities of the two former banks.

Suppose that $\mathcal{A} = \{A_1, \dots, A_n\}$ is a family of n sets, each of size k , and that \mathcal{A} is t -wise independent. Then, for any t -subset \mathcal{A}' of \mathcal{A} , we have

$$g_{\text{eff}} = \frac{1}{2} \left(\frac{1}{g_1} + \frac{1}{g_2} \right) = \frac{1}{2} \left(\frac{1}{g_1} + \frac{1}{g_2} \right) = \frac{1}{2} \left(\frac{1}{g_1} + \frac{1}{g_2} \right)$$

1. 2018 年 12 月 31 日，甲公司“应付账款”科目所属各明细科目期末贷方余额如下表所示：

应付账款明细科目	期末贷方余额（元）
应付账款—A 公司	100,000
应付账款—B 公司	200,000
应付账款—C 公司	300,000
应付账款—D 公司	400,000
应付账款—E 公司	500,000
应付账款—F 公司	600,000
应付账款—G 公司	700,000
应付账款—H 公司	800,000
应付账款—I 公司	900,000
应付账款—J 公司	1,000,000
应付账款—K 公司	1,100,000
应付账款—L 公司	1,200,000
应付账款—M 公司	1,300,000
应付账款—N 公司	1,400,000
应付账款—O 公司	1,500,000
应付账款—P 公司	1,600,000
应付账款—Q 公司	1,700,000
应付账款—R 公司	1,800,000
应付账款—S 公司	1,900,000
应付账款—T 公司	2,000,000
应付账款—U 公司	2,100,000
应付账款—V 公司	2,200,000
应付账款—W 公司	2,300,000
应付账款—X 公司	2,400,000
应付账款—Y 公司	2,500,000
应付账款—Z 公司	2,600,000
应付账款—合计	27,000,000

2. 2018 年 12 月 31 日，甲公司“应收账款”科目所属各明细科目期末借方余额如下表所示：

应收账款明细科目	期末借方余额（元）
应收账款—A 公司	100,000
应收账款—B 公司	200,000
应收账款—C 公司	300,000
应收账款—D 公司	400,000
应收账款—E 公司	500,000
应收账款—F 公司	600,000
应收账款—G 公司	700,000
应收账款—H 公司	800,000
应收账款—I 公司	900,000
应收账款—J 公司	1,000,000
应收账款—K 公司	1,100,000
应收账款—L 公司	1,200,000
应收账款—M 公司	1,300,000
应收账款—N 公司	1,400,000
应收账款—O 公司	1,500,000
应收账款—P 公司	1,600,000
应收账款—Q 公司	1,700,000
应收账款—R 公司	1,800,000
应收账款—S 公司	1,900,000
应收账款—T 公司	2,000,000
应收账款—U 公司	2,100,000
应收账款—V 公司	2,200,000
应收账款—W 公司	2,300,000
应收账款—X 公司	2,400,000
应收账款—Y 公司	2,500,000
应收账款—Z 公司	2,600,000
应收账款—合计	27,000,000

3. 2018 年 12 月 31 日，甲公司“预收账款”科目所属各明细科目期末贷方余额如下表所示：

预收账款明细科目	期末贷方余额（元）
预收账款—A 公司	100,000
预收账款—B 公司	200,000
预收账款—C 公司	300,000
预收账款—D 公司	400,000
预收账款—E 公司	500,000
预收账款—F 公司	600,000
预收账款—G 公司	700,000
预收账款—H 公司	800,000
预收账款—I 公司	900,000
预收账款—J 公司	1,000,000
预收账款—K 公司	1,100,000
预收账款—L 公司	1,200,000
预收账款—M 公司	1,300,000
预收账款—N 公司	1,400,000
预收账款—O 公司	1,500,000
预收账款—P 公司	1,600,000
预收账款—Q 公司	1,700,000
预收账款—R 公司	1,800,000
预收账款—S 公司	1,900,000
预收账款—T 公司	2,000,000
预收账款—U 公司	2,100,000
预收账款—V 公司	2,200,000
预收账款—W 公司	2,300,000
预收账款—X 公司	2,400,000
预收账款—Y 公司	2,500,000
预收账款—Z 公司	2,600,000
预收账款—合计	27,000,000

4. 2018 年 12 月 31 日，甲公司“预付账款”科目所属各明细科目期末借方余额如下表所示：

预付账款明细科目	期末借方余额（元）
预付账款—A 公司	100,000
预付账款—B 公司	200,000
预付账款—C 公司	300,000
预付账款—D 公司	400,000
预付账款—E 公司	500,000
预付账款—F 公司	600,000
预付账款—G 公司	700,000
预付账款—H 公司	800,000
预付账款—I 公司	900,000
预付账款—J 公司	1,000,000
预付账款—K 公司	1,100,000
预付账款—L 公司	1,200,000
预付账款—M 公司	1,300,000
预付账款—N 公司	1,400,000
预付账款—O 公司	1,500,000
预付账款—P 公司	1,600,000
预付账款—Q 公司	1,700,000
预付账款—R 公司	1,800,000
预付账款—S 公司	1,900,000
预付账款—T 公司	2,000,000
预付账款—U 公司	2,100,000
预付账款—V 公司	2,200,000
预付账款—W 公司	2,300,000
预付账款—X 公司	2,400,000
预付账款—Y 公司	2,500,000
预付账款—Z 公司	2,600,000
预付账款—合计	27,000,000

5. 2018 年 12 月 31 日，甲公司“其他应收款”科目所属各明细科目期末借方余额如下表所示：

其他应收款明细科目	期末借方余额（元）
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[illegible]

2010 10 10

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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On October 21, 1943, the special master filed a report recommending that three of appellant's objections be sustained, and that all of his other objections be overruled. Appellant's objections to the special master's report were ordered to stand as exceptions; appellee filed a supplemental report covering the period since the final report of the executor, and on the hearing the court entered a decree overruling the exceptions to the special master's report, approving the report, approving appellee's supplemental report, fixing the fees of the special master, and taxing all costs against appellant. The cause is here by an appeal from that decree.

The testator was a merchant, residing in Kankakee and left ~~him~~ surviving him his widow and appellant, his son by a former marriage, as his only heirs at law and as sole beneficiaries under his will. He was the founder, principal stockholder, president and manager of the Vanderwater Clothing Company, a corporation, which conducted a retail clothing business at Kankakee. He also owned about 1530 acres of land in Arkansas, in two tracts of about 1080 acres and 480 acres, respectively, divided into three farms, subject to three separate mortgages to a land bank. Part of the land was timber, and about 600 acres were farmed in raising rice. Up to the time of the testator's death the mortgages were in good standing, and rice was selling at a good price. His total indebtedness at that time was in excess of \$110,000.

The will gave the executor authority to sell and convey any and all real estate, the executor to use its own judgment as to the selection of the time when the sale should be made so as to get the best available price; also authority to sell

any and all personal property, including stocks, bonds, or other securities, when in its judgment it would be advisable to do so; and directed that out of the proceeds of the real estate and securities the executor should pay the testator's wife, as soon as practical, \$10,000, and to appellant, his son, \$5000; that after such payments the executor should keep the remaining portions of the estate invested in good interest bearing securities, and pay one half of the net income to his wife, and the other half to his son, during the lifetime of the wife, and that after her death the executor should turn over to the son all the property on hand at that time, to be his absolutely, and that the estate should then be closed. The legacies were paid and the widow died during the course of administration.

At the time of the decedent's death the Arkansas land was being operated by him through a local manager. After the decedent's death, a memorandum dated March 21, 1928, signed by him, was found, stating it was by way of information and advice if he should be taken away suddenly, and among other things, stated: "Land in Ark. should be sold as it is hard to handle same. (best price can get) Subject to mortgage to S. W. Joint Stock Land Bank." At the time of his death he had contracted with the local manager to operate the farm for 1930. Shortly after the executor qualified, a written instrument, dated March 28, 1930, was executed by the widow and appellant, which, after reciting that the decedent was operating the rice plantations at the time of his death through a farm manager, under a contract for the year 1930, stated that the signers "consent that said rice farms in the State of Arkansas may continue to be operated by City Trust & Savings Bank of Kankakee, Illinois, as executor of the estate of said Walter S. Vanderwater and that the said bank may advance all neces-

sary funds for the operation of said farms and borrow money, if necessary, for that purpose. * * * this consent shall continue and be operative until revoked in writing by the undersigned." It was never revoked.

Under this arrangement, the executor farmed the rice land for two years, through Mr. Mueller, its cashier and trust officer, thereafter renting it to tenants, and finally sold the land in February or March, 1935, meanwhile disposing of certain stocks of the estate. Part of the farming equipment was sold in February and March, 1934, a Chevrolet truck and a tractor were sold in March and April, 1935, and two other trucks were not sold until March and April 1936. The sale in February, 1934, was by order of the county court,

115 objections were filed to the executor's reports, 70 of which were abandoned. The principal grounds urged for reversal are that the county court, and therefore the circuit court on appeal, had no jurisdiction of the account as to the Arkansas lands, for the reason that it was a trust estate; that the court erred in overruling the objections as to losses sustained in the sale of the Arkansas land, and to losses incurred in the operation thereof by the executor during the course of administration; in overruling objections to losses sustained in the sale of certain stocks, and by failure to collect certain notes, and to fees charged and taken by the executor. ~~Objections not argued are considered abandoned.~~

~~There is a gross error in the account, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.~~ No gross error is assigned as to the sustained objections.

As to the question of jurisdiction, it is a familiar principle of the law that until all the debts and legacies are paid, an estate cannot be closed and a trusteeship opened in

the circuit court. (Wylie v. Bushnell, 277 Ill. 484, 507.)

Under the terms of the testator's will, the legacies were payable only out of the proceeds of sales of real and personal property by the executor, and the executor was not given any trust duties until after the payment of the legacies. The legacies were not all paid until April 13, 1935, after the Arkansas land was sold, and two tractors used on the land were not sold until March and April, 1936, the year that the widow died, and the executor then promptly filed its final report. The will itself expressly set the time for closing the estate as at her death. A trust in the residue of property committed to an executor can only become operative after the settlement of the estate is completed and the trustee receives the property from the executor. The jurisdiction of probate courts extends to all matters necessarily involved in the disposition of the estates of deceased persons from the time of the owner's death until the property has been placed in the possession of those to whom it devolves. (In re Estate of Mortenson, 243 Ill. 520, 525, 527; Wylie v. Bushnell, supra; In the Matter of the Estate of Corrington, 124 id. 363, 366.) The sale of real estate to pay legacies is a probate matter and is an incident to the settlement of the estate. (Rosen v. Rosen, 370 Ill. 173, 175.) Furthermore, appellant is inconsistent in making no objection to the executor's accounts relating to collection of rents of the testator's building in Kankakee, and the payment of taxes, insurance, and other items thereon. Cases cited by appellant have no application here, and his contention as to lack of jurisdiction is without merit.

Appellant's claims that the executor is liable for losses in certain transactions will be considered under the head-

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ings hereinafter mentioned.

Sale of Federal Life Insurance Company Stock.

At the time of the testator's death he owned 46 shares of the stock of the par value of \$100 each, and they were inventoried at \$4600. On May 6, 1930, Mr. Mueller, the executor's trust officer, wrote the Harris Trust and Savings Bank, of Chicago, inquiring about the market value of the stock, and the next day the bank wrote him that a local broker advised them that he could probably sell it around \$250 per share. On the same day the executor received a letter from Hitchcock and Company, in which they said: "We have checked the market value of the stock with a broker here in Chicago and he informs us that there is a very inactive market range from \$240 to \$250." The assistant treasurer of the insurance company testified that on February 24, 1930, there had been a sale of 5 shares by one stockholder to another at \$250 per share, and a like transaction as to 4 shares on April 3, 1930; that stockholders were willing to pay more than outsiders because they wanted to increase their holdings; that he saw the checks, but had no part in the transactions other than to issue the new certificates, and did not know what other factors might have entered into the transactions; that it was difficult to give an opinion as to the market value in 1930, because the stock is closely held and not listed on any exchange; that the capital stock was increased in 1930 from \$500,000 to \$750,000, and that 11 shares were sold at \$135 per share on January 12, 1931; that he could have purchased stock during that month at \$110 per share; and that there was no market value of the stock.

On December 30, 1930, Mr. Mueller wrote appellant concerning the assets of the estate, listing the stock at \$125

per share. In June, 1931, there was a reorganization of the insurance company, and the capital stock was reduced from 7500 shares of the par value of \$100 each, to 37,500 shares of the par value of \$10 each, and the testator's 46 shares were exchanged for 230 shares of the new stock, which were sold by the executor on July 31, 1931, by order of the county court, for \$3390, which Mr. Mueller testified was the market value at that time, and his testimony is not contradicted. Appellant claims the executor should account for this stock at \$250 per share. Up to 1931 the stock was paying dividends of 10% in quarterly installments, and for the year 1930 the executor received \$460 in dividends, in addition to \$574.50 for some script issued by the company in 1930, making a total of \$1034.50 received on the stock in that year.

It is well known that the world wide depression which started suddenly in October, 1929, and grew increasingly worse in the succeeding years, was the cause of more financial losses than any other casualty in history, and it is equally well known that during the first few years thereof it was almost universally considered as only temporary, from which there would be an early recovery. Under that belief, countless numbers of ordinarily prudent, experienced individuals, fiduciaries, business and financial institutions held onto their investments, and thereby suffered increasing losses, without fault or negligence on their part. The acts of the executor in this case are no exception to those of the general run of other ordinarily prudent, experienced security holders in connection with their own affairs. There was nothing about the stock or the circumstances that indicated that it should be disposed of earlier, and only two dividends were passed before it was sold. This was not an uncommon experience with other ordinarily prudent security holders. Although, as remarked in

In re Busby, 288 Ill. App. 500, relied upon by appellant, no mpratorium was declared by the courts on account of the depression on the due performance of their fiduciary duty by executors, and every case of this class is sui generis, it is the well settled law in this State that while a fiduciary must act with the highest degree of fidelity and with the utmost good faith, he is not liable for mere mistakes in judgment, and is held to the exercise of only that degree of skill and diligence which an ordinarily prudent man would exercise under like circumstances in connection with his own affairs. Nothing more can be required of him, and if his acts will stand the test of that rule, he cannot be held liable for any loss that may be sustained by the estate. (Christy v. Christy, 225 Ill. 547, 552, 553; Wylie v. Bushnell, 277 id. 484, 505; Chicago Title and Trust Co. V. Chief Wash Co., 368 id. 146, 155; Cowles v. Morris and Co., 350 id. 11, 25.) The fact that the executor was qualified as a trust company and advertised for trust business does not change the rule as to its liability. In this case, the executor's acts stand the test of the rule, and the trial court correctly approved the special master's report as to this item.

Sale of Vanderwater Clothing Company Capital Stock.

This objection goes to the sale by the executor of 120 shares of the capital stock to Paul Diamond, Arthur A. Carlson and Fred Wischnowski on February 27, 1933, under an order of the county court, and appellant claims that the executor should account for the difference between the par value of the stock and \$1000 as the sale price, with interest at 10% from two years after the date of the letters testamentary. The capital stock consisted of 150 shares of the par value of \$100 each.

At the time of the testator's death he owned 110 shares, E. J. DesLauriers owned 10 shares, Henry S. Leavitt owned 20 shares, and the other 10 shares were owned by the purchasers. On July 15, 1930, the executor acquired the 10 Des Lauriers shares in cancellation of his note to the testator for \$2078.66, and these 10 shares were sold with the other 110 shares. The corporation was the tenant of a building owned by the testator, built for that purpose.

The balance sheet of the corporation, of January 31, 1933, showed assets listed as follows: Cash, \$126.60; Accounts receivable, \$2, 495.15; Inventories, \$19,062.41; Furniture and fixtures, \$9,255.33. The liabilities listed, exclusive of the capital stock of \$15,000, and surplus stated as \$476.46, were: Notes payable, \$7106; Accounts payable, \$3,275.22; Accrued expenses, due Vanderwater estate, \$1,670.16. The business had been losing money ever since the testator's death, and prior thereto, totaling \$32,922.13 for the years 1929-1932, both inclusive, and in 1933 the purchasers lost about \$4500, after putting more than \$6000 new capital into the business.

The proposal by the purchasers for the sale was on the following terms; The purchasers to pay \$1000 cash; pay at least \$3000 on the corporation's note for \$7106 to the City National Bank of Kankakee; execute a new corporate note to the bank for the balance of \$4,100, secured by their personal endorsement; reduce the bills payable to the extent of \$3,000; deliver a bill of sale to the executor for all fixtures and equipment in payment of the corporation's indebtedness to the estate of \$3,415.65; enter into a new lease at a rental of 5% of the gross sales, but not less than \$150 per month for the

first year, and not less than \$200 per month for the remaining 4 years, in advance each month; the lease to include the building, fixtures and equipment. Mr. Leavitt was also to relinquish all his interest in the business and transfer his stock in cancellation of his debt to the corporation of approximately \$250. The sale was carried out in accordance with those terms.

The building was mortgaged for \$33,000, and there were several vacancies in the same block. About \$2400 of the corporation's debt to the estate was owing for the testator's salary. As the depression got worse, sales decreased, and the bank had gone as far as it could in loaning money to the corporation. At the beginning of 1933, the stock was broken and run down, the purchases had been small during the previous season, and it consisted of odds and ends, some of it rather old. The purchasers paid the corporation's obligations, and paid the stipulated rent up to the time the building, fixtures and equipment were turned over to appellant, and he ultimately sold them for about \$8000 or \$9000. Mr. Leavitt had offered in February, 1933, to acquire the business without any payment of money to the executor, but the offer was not accepted. Another offer by the Charles E. Wry Company, of New York, whose financial or credit rating is not shown, had also been rejected. The offer was \$11,250 for half the capital stock, provided the bank would furnish the money, take the stock for security, and establish a permanent credit in the bank for \$5000.

Herman A. Nelson, a disinterested expert, associated with Hart, Schaffner and Marx, wholesale clothiers, in the credit and retail departments, and who had many assignments to country stores in difficulty, testified that the Vanderwater corporation had difficulty in 1932 and the early part of

1933, in paying his employer's account, and that he went there at the invitation of Mr. Leavitt, who was figuring on getting the business going, either by a sale or buying it himself; that it was a tough stock of aged merchandise, with a fair market value of 25% on the dollar; that a good price for the fixtures would be \$2500; and that taking into consideration the debts of the corporation, the capital stock had no value. His testimony is not disputed, and shows that the corporation was actually insolvent. Mr. Diamond testified that with the depression, unemployment, and banks closing, they considered the accounts receivable worth about 60% on the dollar.

Appellant claims that the sale was not in good faith, and that a fraud was practiced on the court, because the petition and order for sale mentioned only the \$1000 as the sale price, and that the other terms were not disclosed to the court. Appellee contends that although the petition and order mention only the \$1000, there was a hearing and the situation was laid before the court. However that may be, it is obvious that the other terms of the sale, by which the estate's account was collected, and an advantageous lease was secured by the estate, whereby the executor would be able to make payments on the mortgage on the building, and the improvement of the financial condition of the corporation, whereby it would be better enabled to carry out the terms of the lease, was of great advantage to the estate; whereas, if the sale had not been made, the business obviously would have failed, the estate's account would have been jeopardized, and it would have had a vacant building, and the mortgage would probably have fallen into default. While the losses of the business had decreased each year since 1930, the business had gotten into

such a perilous state that any prudent person would have recognized that it should be sold. The offer of the Wry Company was manifestly one that no bank or vendor would accept, and the sale was on much better terms than those offered by Mr. Leavitt. It is apparent that even if the court was not advised of the other terms of the sale, they would have only furnished a stronger reason for ordering the sale. The claim that the sale was not in good faith and was a fraud on the court is without merit. Considering all the testimony, the executor made a good sale, and the court correctly approved the special master's report in this respect.

Operation and Sale of the Arkansas land.

In 1928, the directors of the two banks mentioned formed a \$50,000 common law trust, called the Kankakee Farm Land Trust, to take over farms that they had to take on their mortgages. The testator had 35 shares or \$5500 in the trust, which, when liquidated, paid 17½%, and the estate received its proportion of the proceeds. One of the farms owned by the land trust consisted of 320 acres of rice land near the testator's Arkansas land, and was known as the Brosseau farm. It was operated by the testator in his life time, through the same farm manager that operated his lands, and after his death, it was operated for the land trust by Mr. Mueller, through the same farm manager, until it was sold about a year after the testator's Arkansas lands were sold.

Appellant claims that he is not bound or estopped to object to losses and expenses in the farming operations of the testator's lands on account of signing the instrument authorizing the executor to operate the land, for the reason that the executor occupied a fiduciary relation to him, and that he was not advised and the executor did not make a full

disclosure to him of the necessary facts. He also claims that the testator's lands were operated in connection with the Brosseau farm for the benefit of the land trust, and that the written memorandum left by the testator advised an immediate sale of the testator's Arkansas land.

The authorization mentioned, after being signed by the widow, was sent by mail to appellant at Cambridge, Massachusetts, on March 28, 1930, and was signed by him, and returned to the executor on April 1, 1930. Prior thereto, the executor wrote him, requesting that he stop at Kankakee on March 4, 1930, on his way to California, to which he replied that he could not come. He testified that he did not think it worthwhile to comply with the executor's request or consult with them as he knew nothing of the estate, and that he did not make any effort to get in touch with the executor and discuss matters. The executor's officers never saw him until 1940, although he was in Milwaukee in December, 1930. On March 27, 1930, the executor wrote him that it would be necessary to advance considerable money to finance the growing of the rice crop, as the land was not rented, but was being operated by his father, and that the executor was advised that \$10,000 or more would be necessary, and stated: "I hope you will feel free to ask us any questions that you care to in regard to estate matters." The letter sent to him with the contract, dated the next day, was of similar import, and stated that their power as executor was somewhat limited, and they might find it necessary, in order not to sacrifice some of the securities, to borrow some money. In his letter returning the signed agreement, appellant stated: "Certainly that's quite all right. I would not wish you to have to sacrifice any of the estate", and thanked the executor for the de-

tailed explanation. Cases where a fiduciary concealed important facts from the beneficiary, cited by appellant, have no application here.

The claim that the testator's lands were operated for the benefit of the land trust in connection with the Brosseau farm is without any foundation. The sole ground for the claim is that there was some interchange in the use of implements, but it also shows that the Brosseau farm had more implements in comparison with its acreage than the testator's land, and it does not show that the testator's estate contributed any labor or expense in the operation of the Brosseau farm, but shows the contrary. It is also to be observed that the memorandum written by the testator concerning the sale of the land was written about one year prior to the date of his will, in which he stated that the executor was "to use its own judgment as to the selection of the time when the sale should be made so as to get the best available price for said real estate." He kept the land and farmed it up to the time of his death, and had entered into a contract for a new tractor, which the executor paid for, and he had employed his farm manager for the coming year. It is also to be noticed that appellant did not take the deposition of the farm manager, although he went to Arkansas with an attorney for that purpose. The presumption in such a case is that the testimony of the farm manager would have been unfavorable to him. This observation also applies to the other objections of appellant in connection with the Arkansas land.

Within the limits to which an opinion should be confined, it is impracticable to discuss in detail the other objections urged to the operation of the Arkansas lands. The

evidence conclusively shows that the expenditures were only such as were necessary and that they were for the benefit of the estate. It also shows that during the two years that the executor operated the land the operations were carefully conducted in a business like manner, and the crops were duly sold at the market price. Due to the necessary expenses of raising the crops, and the drop in the price of rice, the mortgages became in default, although several payments were made thereon, and at the insistence of the mortgagees the implements were mortgaged to it in July, 1932, as additional security, the land was rented to tenants, and finally, because of continued defaults, due from a lack of income and a decrease in the price of rice, the mortgagees insisted that the implements and the land be sold, which was done, in order to save foreclosure. During that time the executor filed three detailed current reports, a copy of the first one of which was sent to appellant, and a final report up to December 23, 1936, and appellant did not make any objection to any of them until his objections to the final report.

The land was sold in February or March, 1935. An Arkansas lawyer and farmer who was familiar with the land and with land prices, having handled some 20 to 25 sales of land in that and an adjoining county, testified that the fair price of the Vanderwater land in 1935 was \$25 per acre, and the broker who sold it testified that \$26 per acre would be good price for it. This fixes the gross value at from \$58,250 to \$39,780. The amount of the incumbrances was then \$35,964.61, making the net value from \$3,815.39 to \$2,885.39. The land sold for \$2970.70 net, the purchaser assuming \$1627.71 delinquent taxes and a delinquency of \$1812.80 on the mortgages. Not counting the latter item in the purchase price, the sale brought \$4597.71, or \$782.32 more than the net value of the land at its highest figure above. The fact that \$100 was paid

out of the gross proceeds of the sale to one of the tenants for surrendering his lease, does not tend to establish bad management or an unauthorized expenditure. The farm equipment was sold for \$1492.50. Naturally, after being used two years, it could not be expected to bring the value at which it was inventoried, and appellant's claim that the executor should account for it at inventory value cannot be upheld. The fact that the thrasher was used to thresh one crop on the Brosseau farm after the testator's land was sold, is accounted for by the fact that it was not sold at an earlier sale of farm equipment, because Mr. Mueller doubted that a purchaser could be found, and it was stored on the Brosseau farm. This item is so inconsequential as to merit no consideration. So, too, the objection to the farm land trust agreeing to pay \$25 rent for a tractor and to put the same in as good condition at the end of the season as it then was, in place of a proposal by the mortgages to pay a flat \$40 rent for it, does not show that the estate suffered thereby; and the fact that the executor purchased seed rice from the farm land trust instead of using rice from the testator's land for seed, does not establish an unwarranted expenditure.

Appellant's claim that the value of the equity in the land at the time of the testator's death was fixed by the Arkansas Commissioner of Revenue at \$19,341.10 for inheritance tax purposes, is not borne out by the record. That amount was fixed by the Commissioner, as the net value of the whole estate in Arkansas, which included rice on hand sold for \$1936.89, an account in a closed bank of \$514.28, and the farm implements and equipment, the value of which at that time does not appear in the record, and there is no convincing evidence of what the testator paid for the land. Assuming that the value of the land

was less at the time of the sale than it was at the time of the testator's death, that would be because of the depression, from which an early recovery was anticipated. It is to be remembered that the executor was operating the land, instead of selling it, by appellant's express authority, and there is no testimony that shows that the executor could have realized more money for the estate by an earlier sale, or could have found a purchaser at all. One of the witnesses testified it was even hard to find tenants, because everybody was broke. Appellant's claim that the acts of the executor were reckless and unwarranted, that he was unsophisticated and timid, and relied upon the executor, is found against him by the special master, who found that he was alert, well informed on the situation in the case, had a college education, and his only apparent handicap was a difficulty in his speech. The trial court correctly overruled the exceptions to the special master's report in connection with the operation and the sale of the Arkansas land.

Note of E. J. DesLauriers.

Appellant claims the executor should account for the difference between the \$2078.66 note and the value of the stock for which it was exchanged. The testimony shows that DesLauriers' home was mortgaged for \$3900, and there is no testimony that tends to show the note could have been collected out of his equity above his homestead exemption, or that he had any other property subject to execution. Although he was working for the Vanderwater Clothing Company at a salary of \$30 to \$35 a week, he could have defeated garnishment by quitting his job. He claimed to the executor that the note was given for the purchase of the stock, at the testator's insistence, to be paid only out of dividends, and that he was otherwise unable to pay it. The petition for the order to make the exchange

recites that the note was given for the purchase of the stock, which was held as collateral; that the note represented only part of the purchase price; recites DesLauriers' claim as to the agreement with the testator; that the agreement could not be carried out because of the testator's death and that his estate must be settled; that DesLauriers was willing to lose the amounts paid on the note, and that the widow thought the proposition should be accepted. The testimony indicates that the amount credited on the note was by way of dividends, and the order recites that the court heard evidence and found the matters and facts set out in the petition to be true, and ordered the exchange to be made. We find no merit in this objection of appellant.

E. B. Roy Notes.

Two notes signed by E. B. Roy, both dated November 29, 1927, one of them for \$500, due June 1, 1928, the other for \$2500, due November 29, 1928, were found after the testator's death among his papers at the store, in an envelope, marked "N.G." in the testator's handwriting, containing other worthless notes. A certificate by the clerk of the United States District Court for the Western Division, Eastern District of Arkansas, in the jurisdiction where Mr. Roy resided, showing that there were no bankruptcy proceedings against E. B. Roy, between January 1, 1924 and November 27, 1941, was introduced in evidence by appellant. He also introduced in evidence a copy of a petition and schedule from the same court in the matter of the bankruptcy of E. B. Roy, to show that the notes of the testator were not included therein, and on objection of appellee's counsel that it was apparently not the same person in question in this case, appellant's counsel stated that he did not think there could be any question as to the identity

of the persons. Two disinterested witnesses testified they knew E. B. Roy went into bankruptcy. An Arkansas lawyer who tried unsuccessfully to collect the notes for the testator, testified there was an unsatisfied judgment against Mr. Roy for \$29,335, and two others for \$213.70 and \$227.56; that he is insolvent and so far as he knew had been hopelessly insolvent for 17 or 18 years. Mr. Roy bought a small home, and also bought some land, both of which he lost on foreclosure. The home was exempt under the Arkansas law, and his earnings were less than his statutory exemption. There is no showing that the executor could have collected any part of the note, and the exception to the special master's report in this respect was correctly overruled.

Certificate of indebtedness of Arkansas Rice-Growers' Co-operative.

The certificate, held by the testator, was for \$294.16, and the executor sold it on September 11, 1935 to a bank for 50¢ on the dollar, or \$147.08, after trying unsuccessfully to collect it. No dividends had been paid on the stock, and the Co-operative went into bankruptcy on January 15, 1936. Appellant introduced no testimony tending to show that the certificate was worth any more than the amount received for it, and the fact that Mr. Mueller testified that he did not find in the executor's files any petition or order for the sale, does not establish that no such order was made, and at any rate, the transaction amounted to an apparently good collection of a poor claim. There is no merit in appellant's objection to this item.

Failure to Pay Interest on Estate Account.

This objection is based on the fact that on July 1, 1930, the bank paid \$13.09 on the account, and the testimony of a certified public accountant, and his audit, showing yearly aver-

age balances in the account during the whole period ranging from \$2000 to \$4900. The special master found the yearly average balances to be more than \$3000, and disallowed a charge of \$8.00 interest on borrowed money, and a charge of \$179.02 on an overdraft. The accountant testified that he arrived at the monthly balances by totaling the daily balances and dividing by the number of days in the month. Under this method, if the balance was \$1.00 for the first 29 days of a 30 day month, and \$100,000 was deposited on the last day of the month, the average monthly balance would show as \$3333.66. His yearly average balances were arrived at by dividing such average monthly balances by the number of months. This method does not reflect the actual conditions of the account. There is no testimony that the executor bank or any other bank agreed or that it was customary to pay interest on monthly or yearly balances so computed. Mr. Mueller testified that at first the estate account was carried in one account, but that beginning with the first report, the income account was segregated from the principal account, and that while there was a substantial amount in the principal account during the administration, there was a continuous debit balance or overcharge in the income account from the time of the first report which more than offset the principal account, so that if the two accounts were merged it would have shown a debit balance most of the time. The payment of the \$13.09 interest on July 1, 1930, was before there was any ^{segregation} ~~segregation~~ of the accounts. There was no error in overruling the exceptions to the special master's report as to this item.

Fees Charged by the Executor.

Appellant's objection to this item is two-fold. First, that the acts of the executor were such as to forfeit any claim

to fees; and second, that if any fees are to be allowed the executor, the amount recommended by the special master, \$3500, appellant's exception to which was overruled, is excessive. The first contention is disposed of by what we have above said as to the acts of the executor, and, considering the work performed by it throughout the period of administration, together with the amount and character of the estate, many assets and liabilities of which, and transactions in connection therewith, are not herein mentioned, or complained about, the amount allowed is ~~very~~ reasonable. ~~and is not subject to appellant's~~

~~exception~~

We find no error in the decree of the circuit court, and it is affirmed.

Decree affirmed.

In the Appellate Court of the
State of Illinois
Second District

February Term. A.D. 1945.

Anderson Bros. Mfg. Co., an
Illinois Corporation, and Swan
F. Anderson,
Plaintiffs-Appellees,

v.
G. A. Larson,
Defendant-Appellant.

Anderson Bros. Mfg. Co.,
Plaintiff-Appellee,
v.
G. A. Larson,
Defendant-Appellant.

*
Swan F. Anderson,
Plaintiff-Appellee,
v.
G. A. Larson,
Defendant-Appellant.

3201A-21
Appeal from the
Circuit Court of
Winnebago County.

Dove, P. J.:

This is an appeal from a decree of the circuit court of Winnebago County, decreeing specific performance of an alleged verbal agreement between the parties, concerning the assignment of certain shares of stock in plaintiff corporation.

Appellees, Anderson Bros. Mfg. Co., a corporation, and Swan F. Anderson, filed their complaint for specific performance against appellant, G. A. Larson, on July 31, 1940 alleging a verbal agreement between appellant, through his

1987

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In the presence of the
State of Illinois
County of Cook

Notary Public, State of Illinois

Witness my hand and seal
this 1st day of June
1987.

Notary Public, State of Illinois
My Commission Expires 12/31/87
My Office is located at 1234 N. Dearborn St., Chicago, Ill. 60610

Witness my hand and seal
this 1st day of June
1987.

Notary Public, State of Illinois
My Commission Expires 12/31/87
My Office is located at 1234 N. Dearborn St., Chicago, Ill. 60610

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this 1st day of June
1987.

Notary Public, State of Illinois
My Commission Expires 12/31/87
My Office is located at 1234 N. Dearborn St., Chicago, Ill. 60610

Witness my hand and seal
this 1st day of June
1987.

Done, this 1st day of June, 1987.

Notary Public, State of Illinois
My Commission Expires 12/31/87
My Office is located at 1234 N. Dearborn St., Chicago, Ill. 60610
Witness my hand and seal
this 1st day of June
1987.

Notary Public, State of Illinois
My Commission Expires 12/31/87
My Office is located at 1234 N. Dearborn St., Chicago, Ill. 60610
Witness my hand and seal
this 1st day of June
1987.

attorney, B. Jay Knight, and appellees, whereby appellant was to assign 2000 shares of the capital stock of Anderson Bros. Mfg. Co., in the possession of the corporation, for the purchase price of which he had given his promissory note to the corporation for \$9000.00 dated September 7, 1928, due on 30 days demand, on which there was due an unpaid balance of \$4,353.37, and the corporation was to cancel such note. It was further alleged that appellant was also to assign to Swan F. Anderson, 1400 shares of stock in the corporation and Anderson was to cancel appellant's promissory note to him for \$2500.00, dated May 7, 1930, due on 30 days demand, given for the purchase of 1000 shares of stock in the corporation, on which note there was due an unpaid balance of \$2166.43, plus accrued interest, and that Anderson was also to pay appellant the sum of \$2800.00; that the transaction was to be completed through the Illinois National Bank and Trust Co.; that the corporation delivered a letter to the president of the bank, with the two notes, the stock certificate for the 2000 shares, and a check for \$2800.00, with the understanding that the notes would be cancelled, and the check delivered to appellant on his delivery to the bank of the stock certificates assigned; and that appellant refused to comply with his part of the agreement; that appellant was represented by B. Jay Knight and John E. Goembel, attorneys, and that the negotiations were conducted between Swan F. Anderson, individually, and as president of the corporation, and B. Jay Knight, as attorney for appellant, and that notice of claim of attorneys' lien had been served upon appellees and the bank.

Appellant filed a counter claim against the corporation

and its secretary, on account of the alleged refusal to allow appellant to examine the books of the corporation, and an answer denying the authority of his attorneys to make such an agreement, and setting up the Statute of frauds as a defense. Issue was joined on the counter claim and the answer, and the cause was referred to the master in chancery, who filed a report finding the alleged agreement was within the Statute of Frauds and not enforceable. Appellees' objections to the report were ordered to stand as exceptions, and the cause was taken under advisement.

While the cause was still pending, appellees respectively instituted suits against appellant on the two notes, without any reference to the pending action. Later, an amendment to the complaint in the original suit was filed, alleging demands for the payment of the notes, the threatening of suit thereon, and that appellant employed his attorneys to represent him in the settlement and adjustment of existing accounts between him and appellees, and to avoid litigation in respect to the payment of the notes; that on March 20, 1940, appellant's attorneys contacted appellees and entered into a settlement agreement, restating the agreement in substantially the same terms as set out in the original complaint, except that the amendment alleges the 2000 shares were to be assigned to the plaintiffs, and that the \$2800.00 was to be paid by the plaintiffs; that appellant, through his attorney, B. Jay Knight, designated the Illinois National Bank and Trust Co. as the place of deposit of the \$2800.00 and the notes, and agreed to accept delivery to the bank, as appellant's agent, as a settlement of said account; that appellees had fully complied with the agreement, and that appellant, through his agent, the bank,

had accepted the deposit and a part of such notes and cash in settlement of his accounts with appellees, and had actually received the same, but refuses to perform his part of the agreement.

Appellant's motion to strike the amendment was overruled, and he answered, specifically denying that he employed his attorneys to represent him in the settlement and adjustment of any accounts existing between him and appellees, denying the existence of any account to settle between them; denying that his attorneys had any authority to enter into any settlement agreement with appellees; denying that he authorized any such agreement, or that he had any knowledge of any settlement agreement; and again setting up the Statute of Frauds as a defense. Appellees replied, denying the agreement was in violation of the Statute of Frauds.

The trial court sustained appellees' exceptions to the master's report, the three causes were consolidated, and on the hearing the court entered the decree appealed from, granting the relief prayed by appellees, and dismissing the counter claim.

The grounds urged for reversal are that the decree is contrary to law, in that it orders specific performance of an alleged agreement which is executory, which is within the restrictions of the Statute of Frauds, and the terms of which are uncertain, indefinite, doubtful, and lack mutuality; that the record fails to disclose by a preponderance of the evidence that appellant authorized his counsel to accept appellees' proposal; and that the trial court erred in allowing his counsel to testify. On the ground that the counter-claim rests solely on the decision concerning his ownership of the stock, appellant makes no argument as to the dismissal thereof.

had accepted the fact that the settlement was a compromise, and that the settlement was a compromise, and that the settlement was a compromise.

Appellate court in this case, and as a result, the settlement was a compromise, and that the settlement was a compromise, and that the settlement was a compromise.

The trial court found that the settlement was a compromise, and that the settlement was a compromise, and that the settlement was a compromise.

The ground was that the settlement was a compromise, and that the settlement was a compromise, and that the settlement was a compromise.

Appellees urge that the oral agreement was fully performed on their part, and is binding as a mutual settlement agreement; that it is not within the Statute of Frauds, for the reason that the buyer (appellees) accepted part of the goods or choses in action contracted to be sold, and, already having possession of a major part thereof, actually received the same, assenting to becoming the owner, and gave the check for \$2800.00 in earnest to bind the contract; that appellant's attorneys were authorized to make the contract and were competent witnesses; that awarding specific performance is within the sound judicial discretion of the court; and that the decision of the trial judge is in accordance with the weight of the evidence, and is entitled to as much weight as the verdict of a jury on controverted questions of fact.

Appellant was an employee and an officer of the corporation from 1916 to 1930, and from time to time purchased stock therein. His \$9000.00 note to the corporation was originally made for the purchase of 90 shares of the par value of \$100.00 each. That stock was issued in appellant's name. On December 31, 1929, appellant executed a \$2500.00 note to Mr. Anderson for the purchase price of 25 or more of such shares. Later the corporation changed its stock to ~~\$50.00 par shares of~~ no par value, and a 100% stock dividend was declared.

On May 7, 1930, 2000 shares, in place of the 90 shares originally issued to appellant, were issued. Mr. Anderson testified the certificate was issued to him, and that he sold the 2000 shares to appellant, the certificate being held as collateral for the payment of the \$9000.00 note. On the same day, May 7, 1930, appellant executed a new note to Mr. Anderson for \$2500.00, due on 30 days demand, and 1000 shares of no par

value were issued in Mr. Anderson's name, and held by him as collateral for the payment of the last mentioned note. He testified that the prior \$2500.00 note was cancelled, but he retained possession of both notes, together with the certificate of stock for 1000 shares.

Some time prior to the alleged agreement, appellant employed Mr. Goembel to represent him concerning 600 shares of his stock, which had been sold by the receiver of a closed bank, and Mr. Goembel associated Mr. Knight to assist him in the case. In 1938 Mr. Knight represented appellant at a stockholders' meeting, and there appears to have been some meetings between the attorneys and appellees. On February 21, 1939, a written agreement was entered into between appellant and his attorneys for the payment to them by appellant of "the sum of 33 1/3% of any amounts recovered in stock or cash for my holdings." About one year prior to the alleged agreement, Mr. Anderson offered appellant's attorneys \$100.00 for his stock holdings, later increasing the offer to \$700.00, both of which offers included the cancellation of the notes, and both offers were rejected by appellant.

On March 16, 1940, Mr. Knight wrote the corporation, attention Mr. Anderson, that their letter of two days previous, concerning his notes, had come to his attention, and that he thought it would be well to have a meeting and talk the matter out, suggesting that their attorney contact him by March 22, 1940.

Mr. Knight testified that on March 26th or 27th, 1940, Mr. Anderson, accompanied by his son, came to Mr. Knight's office. Mr. Anderson testified that he made an offer for the

stock by offering to cancel his note and the company's note and to make a cash settlement for \$2800.00, and that it included the proposal that all other shares of stock which were in appellant's name were to be turned over to him or to the company. Mr. Knight testified that Mr. Anderson said there were notes which the company held against appellant, one for \$9000.00 and a couple of other notes, and that if appellant "wants to take \$2800.00 and turn in the stock he has in the company and also endorse over another block of stock which he has never endorsed or which needs endorsement, I will pay that amount and we will cancel all of Mr. Larson's obligations to the company".

Mr. Knight further testified that he told Mr. Anderson that he would transmit the proposition to appellant, and afterward called appellant by telephone, told him of Mr. Anderson's proposition, and said that he would ask Mr. Anderson to put the money in the Illinois National Bank and Trust Co., and that appellant replied: "All right, I will be down to see you in the morning, and go ahead and call up Mr. Anderson and tell him the proposition is O.K."; that the next day appellant came to his office and a conversation ensued during which they were alone, until Mr. Knight called his stenographer in during the latter part of the conversation, to take down the subject matter of a written direction to him, and that he started to have it reduced to writing; that the witness made a memorandum in appellant's presence on a piece of yellow paper reading as follows: "2000 shares of stock to endorse 1400 shares endorsed Cancel--3 notes 1-9000 2-2500 Check for 2800", and said to appellant: "Now that's the proposition"; that appellant said: "Well, I don't know whether that is enough or not"; that the witness then said: "Well, that

is the proposition. It is up to you to say whether it is enough or not. Tell me what to do"; that appellant then asked: "Will the money be deposited in the bank so we will know there is no backing out?"; and that the witness then said: "Yes, we will make them take the money to the bank together with the notes and upon your making the necessary endorsements on the stock the notes and the \$2800.00 will be turned over to you." The abstract does not show any further conversation between them, except the stenographer's notes, which read:

Mr. Knight: "Swan Anderson took 2000 shares of stock left with Abegg, subject to your endorsing the stock and 1400 shares you are to bring in for endorsement, and upon your doing that, they will cancel three notes, one for \$9000.00, two for \$2500.00 and deliver check for \$2800.00. That is the set up. That is what has actually been left there, and that's the \$9000.00 that must have endorsements on it. That's the one that must have been paid on from time to time, is that right?" Mr. Larson: "Yes, that's reduced over half". Mr. Knight: "So that's how, and one of these \$2500.00 notes must have been nearly paid." The stenographer's testimony definitely fixes the date of this conversation as March 27, 1940. From Mr. Knight's statement to appellant that it was up to him to say whether the offer was enough and asking directions as to what to do, it is apparent that up to that time he did not consider he had any authority to accept the offer of appellees. There is no testimony that appellant told Mr. Knight what to do, or that he would accept the proposition. Appellant testified he suspected a trap and left the office immediately after the stenographer took a few notes. His testimony as to the time he left the office is corroborated by the stenographer, and is not contradicted by Mr. Knight's testimony that he did not

leave while the notes were being taken. He also testified that after March 30, 1940, he considered his attorneys dropped, and asked for the files, wanting to go somewhere else.

Mr. Knight further testified that after appellant left the office, he called Mr. Anderson and told him that appellant had said to go ahead with the deal; that he told Mr. Anderson to take the three notes and any stock he wanted endorsed, to the bank, with a check for \$2800.00, payable to appellant and his two attorneys. He also testified that he called Mr. Goembel and told him of Mr. Anderson's offer. When he did so is not shown by the record. He and Mr. Goembel testified that they had a meeting in Mr. Knight's office, but neither of them testified that appellant authorized either of them at that meeting to accept the offer of Mr. Anderson. Mr. Knight fixed the date of the meeting as in the two or three day period while the negotiations were going on.

Mr. Goembel's knowledge of the terms of the alleged agreement was derived from what Mr. Knight told him by telephone, the terms of which he did not remember on the trial. He testified that in either March or April, 1940 he had a conversation with appellant and had advised him to accept the proposition, and that appellant said he would do so; that he called Mr. Knight by telephone, and that it was his recollection that he sent appellant over to Mr. Knight's office; and that it was also his recollection that he communicated with the Andersons telling them the offer was accepted, but he did not testify positively that he did so. Mr. Anderson's testimony makes no mention of any such communication to him by Mr. Goembel, and both the complaint and the amended complaint base the action on an alleged contract through Mr. Knight only. Our conclusion is that Mr. Goembel was mistaken in his recollection in this respect.

Appellant denied having authorized either Mr. Knight or Mr. Goembel to accept the proposition, or having authorized either of them to designate the bank as escrow agent, or ever authorizing any deposit to be made there for him. He testified that at the conference in Mr. Knight's office in March, 1940, he told Mr. Knight he would not accept the offer; and that he had told him that on three separate occasions; that he had talked with both attorneys on several occasions before March 25th or 26th, 1940, but did not consult Mr. Goembel at any time concerning the offer in controversy which had been made by Mr. Anderson, and that he did not see him on March 27th, 1940. He also testified that at the time he declined to accept the \$100.00 offer, about March or April, 1939, he notified both Mr. Knight and Mr. Goembel in writing that they had no authority to make a deal for him; and that in May, 1939, he told them that he did not want any further meetings between them and Mr. Anderson unless he was present, and that at that time, submitted a memorandum confirming that instruction. Mr. Knight testified he had no recollection of any memorandum given him in March, 1939, and that on search of his files he found none, but he did not testify positively that no memorandum was given him, and Mr. Goembel did not testify about that matter.

On March 26, 1940, a letter signed "Anderson Bros. Mfg. Co. Swan F. Anderson, President", was written to "Mr. Eugene Abegg, Illinois National Bank & Trust Co." The letter read:

"Mr. G. A. Larson has asked through his attorney that we leave the following notes with you for collection.
One to Anderson Bros. Mfg. Co., dated Sept. 7, 1928, for \$9000.00.

One to Swan F. Anderson, dated May 7, 1930, for \$2500.00.

In payment of these two notes Mr. Larson is to sign stock certificate No. 23 for 2000 shares of Anderson Bros. Mfg. Co. Stock,

10. The following table shows the number of people who attended the 2008 Summer Olympics in Beijing, China.

Wig. Co. Stock
stock certificate No. 55 for 2000 shares of Anderson Bros.
In payment of these two notes Mr. Larson is to sign
\$2500.00.
One to Owen E. Anderson, dated May 7, 1937, for
for \$2000.00.
One to Anderson Bros. Mfg. Co., dated Sept. 7, 1937,
we leave the following with you for collection.
"Mr. O. E. Anderson was asked this question and stated that

The following stock is to be purchased at the rate of \$2.00 per share:

Certificate	#18	-	200	shares
"	#19	-	400	shares
"	#20	-	200	shares
"	#21	-	600	shares
Total			1400	shares, amount \$2800.00"

The letter makes no mention of appellant's original \$2500.00 note to Mr. Anderson, and it makes no mention of the 1000 shares of stock for which the \$2500.00 notes were given.

This letter was dated on the day prior to the conversation between appellant and Mr. Knight, in which Mr. Knight testified he told appellant that the proposition was up to him, and asked appellant to tell him what to do. It therefore could not have been written by authority given Mr. Knight by appellant. It is also to be noted that it was addressed to Mr. Abegg, and there is no testimony or claim that he was to act as escrow agent.

Mr. Anderson testified that he had been exercising ownership of the 1000 shares of stock since May 7, 1930; that he had sold them to appellant on contract, and when the contract was not paid, he was not required to turn the stock over to appellant; and that the only written memorandum of the sale was the \$2500.00 note. No explanation is offered as to how he converted the type of his holding of the 1000 shares from a collateral holding to that of ownership of the stock. Manifestly he could not do so without crediting the note with the value of the 1000 shares at that time. (Levy v. Chicago National Bank, 158 Ill. 88.) But, so far as the testimony shows, he made no such credit. The agreement alleged by the complaint and the amendment thereto, did not embrace anything with relation to whether appellant's rights in the 1000 shares were to be surrendered, and the testimony is not clear in this respect. The memorandum on a piece of yellow paper written

by Mr. Knight makes no mention of the 1000 shares of stock, and it is not mentioned in the stenographer's notes, nor in the letter from the corporation to Mr. Abegg. Neither Mr. Anderson's nor Mr. Knight's testimony discloses whether Mr. Anderson or the corporation was to purchase the 1400 shares of stock. The letter to Mr. Abegg indicates that the corporation was to be the purchaser, but the check for the \$2800.00 purchase price was Mr. Anderson's personal check. Neither does the letter to Mr. Abegg indicate to whom the 2000 shares were to be assigned, and the testimony of both Mr. Anderson and Mr. Knight, as well as the memorandum prepared by the latter, is equally vague. The alleged agreement is not separable in its terms, and it is obvious that with such uncertainties existing, appellant could not maintain a suit for specific performance against appellees or either of them. The alleged agreement therefore lacked mutuality. Unless a contract can be specifically enforced as to all parties, equity will not interfere. (Winter v. Trainor, 151 Ill. 191, 195.) It is also well settled that to entitle a party to specific performance the contract must be clear and certain in its terms and be admitted or proved with a reasonable degree of certainty. (Gammon Co. v. Standard Trust and Savings Bank, 327 Ill. 489, 500; Sallo v. Boas, 327 id. 145, 150; Heroux v. Romanowski, 336 id. 297, 298.) The uncertainties mentioned are alone enough to defeat a claim for specific performance in this case. Furthermore, the letter to Mr. Abegg indicates that the original \$2500.00 note from appellant to Mr. Anderson was not sent with the letter, to be surrendered, as contemplated by the memorandum made by Mr. Knight, and therefore appellees did not show that they had performed their part of the alleged agreement, and are in no position to require specific performance by appellant.

Furthermore ~~there is no showing or claim~~ there is no showing or claim that at the time of the alleged agreement, appellees, or either of them, owed appellant anything, or that appellant owed either of them anything, except the unpaid balance on the two notes given for the purchase of 2000 shares and 1000 shares, respectively, of stock in the corporation, and there is no showing that any account existed between them. The 1400 shares of stock were in no way involved with the debt on the notes, or with the other shares of stock. The letter to Mr. Abegg specifically states that the 1400 shares were to be purchased at \$2.00 per share. The claim that the alleged agreement was an executed settlement agreement of accounts existing between the parties is therefore without any foundation. It merely involved an alleged agreement by which one of the parties was to assign stock, and the other parties were to cancel notes and purchase stock, purely executory in character. The proposed purchase of the 1400 shares was part and parcel of the alleged agreement, not separable from the other parts of it. It involved more than \$500.00 as the purchase price, and being verbal, was within the Statute of Frauds, (Ill. Rev. Stat. 1943, chap. 121 $\frac{1}{2}$, par. 4).

The exceptions in that section where a buyer accepts part of the goods or choses in action contracted to be sold, and actually receives the same, or gives something in earnest to bind the contract, or in part payment, manifestly have no application here. The 2000 shares were held by appellees, or one of them, as collateral, and by the terms of the letter to Mr. Abegg, to be accepted, required appellant's assignment. That position was not changed, and therefore there was no acceptance by appellees. They cannot rely upon their possession as manifesting acceptance, for the reason that their suit seeks assignment of the stock by appellant. And it is the

rule of law that the intent to deliver must be mutual. Neither party alone can effect a delivery and acceptance. (Illinois Meat Co. v. American Malt and Grain Co., 229 Ill. App. 311; Chicago Metal Refining Co. v. Jerome Trading Co., 218 id. 333.) Otherwise a bailor would be at the mercy of his bailee. As to the claim that the \$2800.00 check was a payment, within the terms of the exception in the statute, it was not accepted by appellant. Whether the bank was selected by appellant's attorney, or by appellees, as escrow agent, is immaterial. The papers were sent to Mr. Abegg by the corporation, or by appellees, who thereby selected him as its or their agent, and were therefore never out of the control of the corporation or Mr. Anderson personally. The same is true of the notes, which were not cancelled, but, with the check, were produced by appellees intact at the trial. The statutory exception as to payment of earnest money, or part payment, has no application here. From Mr. Knight's attempt to secure written directions to him from appellant, it is apparent that he felt the necessity therefor. Gradle v. Warner, 140 Ill. 123, and other cases relied upon by appellees, where the party to be charged had signed an agreement, or where the claimant had completely performed his part of a contract, are not in point.

Our conclusion is that the alleged agreement was wholly executory, and was not a settlement of any existing account between the parties; that it was so uncertain and indefinite that there was never a meeting of the minds of the parties; and on account of its uncertainty and indefiniteness, it cannot support an action for specific performance; and further, that it was clearly within the Statute of Frauds. It is obvious that the doctrine that awarding specific perform-

ance is within the sound judicial discretion of the court does not apply to such cases. It is also the rule that it is only where the court has heard the evidence that a decree will not be disturbed unless it is against the weight of the evidence, and the rule is not applicable where the testimony is taken by the master in chancery. (Jones vs. Koepke, 387 Ill. 27, 107.)

Under these circumstances it is not necessary to consider other grounds urged for reversal. Another trial could not obviate the material difficulties, and there is therefore no occasion to remand the cause. The decree is accordingly reversed.

Decree reversed.

Abstract

GEN. NO. 10019.

AGENDA NO. 15

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A.D. 1945.

D. T. SMILEY,
Appellant,
vs.
SAMUEL CARSON,
Appellee.

32 I.A. 2²
APPEAL FROM THE COUNTY COURT
McHENRY COUNTY.

HUFFMAN, J.

This is an action by appellant to recover for attorney fees alleged to be due from appellee. They are claimed to have arisen by virtue of services rendered by appellant on behalf of appellee in and about securing his release from the asylum and order of restoration. The State Bank of Woodstock became a party to the proceedings by virtue of the fact that it was made garnishee. On motion of the parties-defendant, the petition of appellant was dismissed, and appeal from such order of dismissal with judgment for defendant, has been brought to this court.

The abstracts and briefs are far from enlightening as to the relationships between the parties with respect to the mat-

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ters in controversy. The brief for appellee is wholly inadequate and complies with no rule of this court in any respect. After such consideration of the case as is available to us, we are of the opinion the petition of appellant is sufficient to have required answer thereto.

The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

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Gen. No. 10009.

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Agenda No. 7.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1940.

Louis Meppen, Individually, and Louis)
Meppen, Executor of Last Will and)
Testament of Wilhelmina Meppen, De-)
ceased,)

Appellees,)

vs.)

Arthur Meppen et al.,)

Appellant.)

Appeal from
Circuit Court
Lee County.

WOLFE,-- J.

Louis Meppen, in his own right, and Louis Meppen as executor of the last will and testament of Wilhelmina Meppen, deceased, filed a complaint in the circuit court of Lee County, Illinois, for partition of certain lands in said county. Arthur Meppen, William Meppen, Lucy Wadsworth, H. L. Wadsworth, Olive Meppen, Jessie Meppen, Olive Hart Meppen, Alice Meppen and Martha Meppen, as heirs of Wilhelmina Meppen, were made parties defendant to the suit, as were Louis Pitcher, Lement Schuler and Leonard G. Rorer, trustees of the City National Bank of Dixon, Illinois.

The complaint alleges that Louis Meppen is entitled to an undivided one fourth of the premises; that Arthur Meppen is

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entitled to an undivided one fourth thereof; that Lucy Wadsworth is entitled to an undivided one fourth thereof, subject to the claim of Louis Meppen as executor of the last will and testament of Wilhelmina Meppen, deceased, on her note for the sum of \$3,900.00 (secured by trust deed); that William Meppen is entitled to an undivided one fourth thereof, subject to the balance due on his note of \$1,200.00 and subject to a certain mortgage dated January 17, 1928, given to secure Alice Meppen against loss because of having signed a note of said William Meppen to the City National Bank of Dixon, Illinois, as surety for the sum of \$1,475.00 and subject also to the lien of a judgment entered in the circuit court of Lee county, Illinois, on September 10, 1938, in favor of Louis Pitcher, Dement Schuler and Leonard G. Rorer, trustees of the City National Bank of Dixon, Illinois, a corporation, against W. H. Meppen and Alice Meppen for the sum of \$1,175.06.

The complaint further alleges that said William Meppen is insolvent and said indebtedness to the estate secured by his note was an advancement, and the county court had so decided; that the share of Lucy Wadsworth in the assets of the estate of Wilhelmina Meppen is insufficient to offset her liability on her said note and the share of William Meppen in said assets is insufficient to offset his said indebtedness to said estate.

The plaintiffs pray for the partition of said real estate and that the indebtedness of William Meppen be declared to

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be a first lien upon his one-fourth interest, and prior and superior to, the lien of the judgment in favor of said Louis Pitcher et al., trustees, etc., and that upon a sale of said property the share of William Meppen shall be paid to Louis Meppen, as executor, to be administered in the county court, etc., and for general relief.

Louis Pitcher, Dement Schuler and Leonard G. Rorer, trustees, as aforesaid, appeared and moved, that the complaint of Louis Meppen, as executor of the last will and testament of Wilhelmina Meppen, deceased, be stricken and that he be dismissed as a party to this suit.

The court on July 17, 1943, ordered that the complaint of Louis Meppen, as executor of the last will and testament of Wilhelmina Meppen, deceased, be stricken and that he be dismissed as a party to this suit. From this order, Louis Meppen as executor, perfected an appeal to this Court. We there held that the interest that William takes in his mother's estate is subject to a lien of the debt he owed on the estate, and the estate had a prior claim for the payment of the debt before a judgment creditor could have any claim against his share in the estate. We reversed and remanded the case to the trial court. Meppin vs. Meppin, 321 Ill. App. page 566.

The trial court redocketed the case and entered a decree in conformity with the finding of our Court. Evidence was heard and a decree of partition entered, and a sale of the

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property ordered. It is from this decree that the appeal is prosecuted to this Court.

The appellees made a motion to dismiss this appeal. The motion was taken with the case after full consideration of the motion to dismiss, and the same is hereby denied.

In our former opinion we used this language: "The only question for our consideration is whether the trustees of the City National Bank of Dixon, Illinois, because of the judgment which they had procured against William Meppen in 1938, have a prior claim on William Meppen's interest in the estate of his deceased mother, or whether the executor of the estate of Wilhelmina Meppen should first be paid the indebtedness which is owed by William Meppen to the estate, or should be deducted or charged against William Meppen's share in his mother's estate. It is insisted by the appellant that the executor has an equitable lien on the real estate devised to one who is indebted to an estate, and such lien is prior and superior to a lien of a judgment in favor of a creditor of such devisee, irrespective of the date of the judgment."

Exactly the same question is raised in this appeal, as in the former one. Questions of law, which have been decided by an Appellate Court on the appeal of a case, will not be again considered on the second appeal, and the decision on the appeal is binding, not only on the trial court in the further progress of the case, but also on the appellate tribunal in any subsequent appeal. *People vs. Militzer*, 301 Ill. 284. We reaffirm what we said in our former decision. *Fleming vs. Yeazel*, 379 Ill. page 343. The decree of the trial court is hereby affirmed.

Decree Affirmed.

Extract

~~STATE OF ILLINOIS~~
~~APPELLATE COURT~~
~~THIRD DISTRICT~~

General No. 9446

~~Agenda No. 2~~

BANKERS LIFE COMPANY, a Corporation,
for the Use of CONTINENTAL CASUALTY
COMPANY, a Corporation,

~~Plaintiff~~ Appellant,

v.

UNION AUTOMOBILE INDEMNITY ASSOCIA-
TION,

~~Defendant~~ Appellee.

~~Appeal from~~
~~McLean County~~
~~Circuit Court.~~

320 I.A. 33²

Mr. Presiding Justice Riess delivered the opinion of the Court.

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Suit was filed by Plaintiff-Appellant, Bankers Life Com-
pany, as nominal Plaintiff, for the Use of Continental Casualty
Company, against Defendant-Appellee Union Automobile Indemnity
Association to recover damages alleged to have been sustained as a
result of defendant's failure to furnish legal defense to the Plain-
tiff-Appellant in a prior suit by one Charles Truex seeking re-
covery of damages in the sum of \$10,000 against Frank G. Snider, an
alleged agent of Plaintiff-Appellant, in the Superior Court of Elk-
hart, Indiana. Upon defendant-appellee's motion, the suit was dis-
missed at plaintiff's costs for failure to state a cause of action,
from which judgment on the pleadings, the Plaintiff has appealed to
this Court.

The complaint alleged in substance that the Plaintiff, an
Iowa corporation, was licensed to write life insurance in the State
of Indiana and that on October 15, 1937, defendant was duly licensed
in said State to write automobile and other insurance; that on or
about April 20th of said year, defendant issued an automobile policy
of insurance No. FF-1366 to Frank G. Snider of Elkhart, Indiana, in-
suring said Snider against actual loss or expense from the liability
imposed by law resulting from claims upon him by reason of the use,
maintenance or operation of a 1936, six-cylinder Plymouth business
coach, which policy limited defendant's liability to \$5000 for one
person and \$10,000 for one accident; that it was further provided

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General No. 0440

COMPANY, a corporation,
for the use of said
BANKING LIFE COMPANY,
INCORPORATED

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Mr. President Justice Ideas Delivered at the Court.

This Court

The complaint alleges that on or about March 1936, the Iowa Corporation, was licensed to sell its insurance in the State of Indiana and that on or about March 1936, defendant was duly licensed in said State to write automobile and other insurance; that on or about April 30th of said year, defendant issued an automobile policy of insurance No. 77-1386 to Frank E. Snider of Ellettsville, Indiana, insuring said Snider against actual loss or expense from the liability imposed by law resulting from claims upon him by reason of the use, maintenance or operation of a 1936, six-cylinder Plymouth business coach, which policy limited defendant's liability to \$5000 for one person and \$10,000 for one accident; that it was further provided

under the head of "Additional Protection" that defendant agreed to investigate all reported accidents covered by the policy and to defend for and in the name of the assured any suits, even if groundless, against the assured for damages in any civil action covered by the policy and pay all expenses incurred in such investigation or defense; that by the terms of the policy under the heading of "General Conditions" its provisions were extended to cover as an additional assured any person while operating such automobile so covered by said policy and any firm or corporation legally responsible for its operation where the disclosed and actual use of said automobile is for "pleasure and business" or "commercial" purposes as defined in the policy; that on or about March 6, 1937, the Continental Casualty Company issued its combination automobile policy of insurance No. 2310061 to plaintiff; that an Employer's Non-Ownership Liability Endorsement was attached to and made a part of said policy by which endorsement it was agreed between plaintiff and said Continental Casualty Company that the policy was extended to cover legal liability, subject to its limitations, as defined in the policy, of the plaintiff only, for damages arising out of accidents as a result of operation in plaintiff's business of any automobile or motorcycle of the private passenger type or in plaintiff's business by an employee of any motor vehicle of commercial type, provided such operation is occasional and not frequent, and provided the automobile or motorcycles of the private passenger type and commercial motor vehicles were not at the time of the accident (1) owned in whole or in part by the plaintiff herein, (2) hired or leased by the plaintiff herein, (3) registered in the name of the plaintiff herein; that the policy covered the liability of plaintiff from March 6, 1937 to March 6, 1938; that the limits of liability of the Continental Casualty Company was \$25,000 for each person and \$50,000 for each accident. The provisions of the policy in reference to other valid and collectible insurance were eliminated as respects the coverage provided by the endorsement and if there existed at the time of the accident any insurance taken out or effected on behalf of anyone other than the plaintiff, under the terms of which plaintiff was entitled

under the head of "Additional Protection" that defendant agreed to investigate all reported accidents covered by the policy and to defend for and in the name of the assured any suits, even if brought against the assured for damages in any civil action covered by the policy and pay all expenses incurred in such investigation or defense; that by the terms of the policy which were extended to cover as an additional insured persons, the provisions were extended to cover as an additional insured any person while occupying a motor vehicle owned or operated by the assured and any firm or corporation holding responsibility for the operation where the assured was a partner, officer, director, or employee; that and business" or "commercial" purposes as defined in the policy; that on or about March 6, 1937, the Continental Casualty Company issued its condition automobile policy of insurance No. 231662 to plaintiff; that an employee's non-ownership liability insurance was attached to and made a part of said policy of which endorsement is attached between plaintiff and said Continental Casualty Company, that the policy was extended to cover legal liability, subject to its limitations, as defined in the policy, of the plaintiff only, for damages arising out of accidents as a result of operation in plaintiff's business of any automobile or conveyance of the plaintiff's passenger type or in plaintiff's business by an employee of any motor vehicle of commercial type, provided such operation is occasional and not frequent, and provided the automobile or conveyance of the plaintiff's passenger type and commercial motor vehicles were not at the time of the accident (1) owned in whole or in part by the plaintiff herein, (2) listed or leased by the plaintiff herein, (3) registered in the name of the plaintiff herein; that the policy covered the liability of plaintiff from March 6, 1937 to March 6, 1938; that the limits of liability of the Continental Casualty Company was \$25,000 for each person and \$50,000 for each accident. The provisions of the policy in reference to other valid and collectible insurances were eliminated as respects the coverage provided by the endorsement and it there existed at the time of the accident any insurance taken out or effected on behalf of anyone other than the plaintiff, under the terms of which plaintiff was entitled

to protection and coverage, then the coverage provided by endorsement shall only be excess insurance over and above the amount of such other valid and collectible insurance; that on or about June 29, 1939, a complaint for \$10,000 damages was filed in the Superior Court of Elkhart, Indiana, by above Charles Truex, as plaintiff against said Snider and the plaintiff herein as defendants, which complaint was amended on November 7, 1941; that said suit was predicated upon the theory that defendant Snider was at the time acting as agent, servant or employee of the plaintiff herein and was then driving said 1936 Plymouth business coach in the scope of his employment as such agent; that said complaint, if true and proven established a case of liability against plaintiff herein; that under provisions of defendant's policy in paragraph six thereof, plaintiff, upon filing said complaint became an additional assured under defendant's policy and was obligated to defend the suit for and in the name of plaintiff even if said suit was groundless; and that said obligation to defend said suit was primary and direct; that the policy of said Continental Casualty Company to plaintiff became and was excess insurance over and above the amount of insurance afforded by defendant's policy so issued by it to Snider; that the automobile driven by Snider at the time of the accident was not owned in whole or in part by plaintiff herein or hired or leased by or registered in his name; that by letter dated March 16, 1940, plaintiff demanded that defendant defend the Truex suit on behalf of this plaintiff and called defendant's attention to said existing policy with Snider and its alleged obligation under said policy to defend the suit on behalf of plaintiff but that defendant refused to defend the plaintiff herein and that thereby Continental Casualty Company, as insurance carrier for the plaintiff under its policy became obligated to defend and did defend plaintiff in that suit which was tried in the Superior Court of Elkhart, Indiana, and resulted in a verdict in favor of the plaintiff herein and against said Snider; that an appeal from said judgment was taken to the Appellate Court of Indiana by plaintiff Truex, the appeal being entitled "Frank G. Snider v. Charles L. Truex and Bankers Life Company of Des Moines, Iowa"; that as result

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of such appeal, Continental Casualty Company became obligated to file a brief on plaintiff's behalf and did file such brief in said appeal case; that said company was forced to expend \$993.27 for costs and attorneys' fees in defense of said suit together with \$17.30 for costs and attorneys' fees on account of filing the brief in said Appellate Court on behalf of this plaintiff; that under the terms of the policy issued by said Continental Casualty Company to the plaintiff said company was subrogated to all the rights of recovery of plaintiff herein to recover any payment made under said policy. Judgment in the sum of \$1,010.57 together with costs and attorneys' fees was sought to be recovered from the defendant for the Use of said Continental Casualty Company. Copies of the policies in question were attached as exhibits to the amended complaint. A motion to strike a number of paragraphs of the complaint was filed by the defendant on the grounds that complaint nowhere alleges that defendant Union Automobile Indemnity Association was legally responsible for the operation of the Snider car at the time and place of injury complained of in the suit therein referred to. The Trial Court, on March 4, 1944, entered an order finding that it had jurisdiction of the parties and subject matter; that the matters set forth in the motion to strike and for Judgment by the defendant are true; that because of the failure of plaintiff to allege that it was legally responsible for the operation of the Snider car at the time and place of injury complained of and referred to in numerous paragraphs therein, the complaint fails to state a cause of action against the defendant and defendant's motion is granted and the complaint stricken and suit was dismissed at plaintiff's cost.

Among other provisions, the policy No. FF-1366 provided under Subdivision II "Against actual loss or expense of the Assured from the liability imposed by law, arising or resulting from claims upon the Assured by reason of the use, maintenance or operation of the automobile described herein;" that the Additional Protection clause of the policy provides "Investigation and Defense: The Association agrees to investigate all reported accidents covered hereby; to defend

for, in the name of the assured, any suits, even if groundless, brought against the assured to recover damages under any civil action covered herein, and to pay all expenses incurred by the Association for such investigation or defense;" that under the heading General Conditions, the policy further provided as follows: "Additional Assured: This policy is extended to cover as an additional assured any person while operating any automobile described in the Declaration or any person, firm or corporation legally responsible for its operation, where the disclosed and actual use of the automobile is for 'Pleasure and Business' or 'Commercial' purposes as herein defined and the automobile is being so used with the permission of the named assured, or if the named assured is an individual with the permission of any member of the assured's household (over twenty-one years of age) other than a chauffeur or domestic servant. Provided, however, (1) that this extension of the policy shall not enure to the benefit of an automobile sales or service agency or garage of any description or parking station, or the agents or employees thereof; (2) that the insurance under this policy shall be available first to the named assured, and the remainder, if any, to other persons entitled to the benefits hereunder; (3) that the defenses of the Association against the named assured shall be available to it against any additional assured included hereunder."

The endorsement in policy CA-2310061 issued by Continental Casualty Company to the Bankers Life Company under date of February 23, 1937, provided in an endorsement that "The provisions of this policy in reference to other valid and collectible insurance are hereby eliminated as respects the coverage provided by this endorsement and, it is agreed that if there exists, at the time of the accident, any insurance taken out by or effected on behalf of any one other than the named Assured, under the terms of which the named Assured is entitled to protection and coverage, then the coverage provided by this endorsement shall be excess insurance over and above the amount of such other valid and collectible insurance." A certified copy of the complaint in the Indiana suit was attached as Exhibit 3. Defendant's motion to

strike and for judgment filed by the Union Automobile Indemnity Association moved to strike said numerous paragraphs as hereinabove recited for reason that the complaint nowhere alleges that it was legally responsible for the operation of the Snider car at the time and place of the injury complained of in the suit referred to, which motion was granted and plaintiff's suit dismissed and the appeal to this Court was perfected as hereinabove recited.

Appellant contends that since Truex charged that Snider was an agent of the Bankers in operating the car at the time of the accident, the Union Automobile Indemnity Association was obliged under the terms of its policy to defend the suit of the Bankers because of its policy clause contending that its policy would cover an additional assured, "any person, firm or corporation legally responsible for its operation if such operation was with the permission of the named assured, etc." Defendant's motion pointed out that the plaintiff bases its right of recovery on the theory that Bankers was covered by the clause protecting those who were "legally responsible for the operation of the car" which allegation was necessary in order to bring Bankers within the plain terms of the policy. The Continental further contends that the policy was effective "on behalf of any one other than the named Assured, under the terms of which the named Assured is entitled to protection and coverage, then its coverage should be excessive insurance, etc.," but also contends that the provision in the Union's policy to Snider provided that "no recovery shall be had under this policy if, at the time the loss occurs, there shall be any other insurance, whether such other insurance be valid and/or collectible or not, covering such loss, which would attach if this insurance had not been effected" should be wholly ignored, notwithstanding it admits it was bound under its policy to defend the claim. By this means they seek to bring about a situation where the Continental would be entirely relieved from responsibility which would be placed upon a company to receive no premium for coverage and its policy expressly provided it would

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not extend coverage to persons or firms already covered by insurance against the claim sued on.

Appellee contended that the judgment should be affirmed because the Bankers Life Company was, under no circumstances an additional assured under the policy of the Union Automobile Indemnity Association for the reason that it was expressly excluded from said coverage as it had other insurance covering the accident; that it could not claim protection under the Snider policy clause extending protection to a firm or corporation "legally responsible for the operation of the car" and at the same time deny that legal responsibility; that the Continental Casualty Company was obliged in any event to defend the Bankers Life Company because the claim made against Bankers Life Company was far in excess of the limitation of the policy issued by the Union Automobile Indemnity Association to Snider; that in event there was a joint obligation of the two companies to defend the Bankers Life Company upon the theory the latter was "legally responsible" then by the terms of the Union policy, under which they seek to recover, Continental became liable for five-sixths of all of the expenses, including the amount of the judgment recovered; that under no circumstances could the Continental Casualty Company claim that the Bankers Life Company was within the terms of the Union Automobile Indemnity Association policy without alleging that Bankers Life Company was legally responsible for the operation of the car.

The beneficial plaintiff herein was the Continental Casualty Company. While an insurance policy is to be construed most favorably to the insured, it is equally true that no strained or unwarranted construction is to be adopted which is plainly not within the terms of the instrument. *Soukup v. Halmel*, 357 Ill. 576; 192 N. E. 557. It was necessary for the plaintiff to allege and prove as a basis for its cause of action that the Bankers Life Company was legally responsible for the operation of the Snider car. *Soukup v. Halmel*, supra. No Illinois case is cited by appellant extending or denying

not extend coverage to persons already covered by another private health plan.

APPROVED FOR RELEASE BY THE NATIONAL ARCHIVES

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coverage to an employer or principal as an additional assured under the terms of the stock coverage found in these two policies. In passing upon the allegations of the complaint, only facts well pleaded will be considered and on motion to strike or dismiss, the conclusions of the pleader therefrom are not to be taken as admitted. The burden rested upon plaintiff to allege and show that defendant was covered by the terms of the policy. It does not appear that the plaintiff was covered by the additional assured clause of the policy. Unless plaintiff alleged that it was legally responsible and had no other coverage there would be no protection under the defendant's policy and the question arises as to whether the Bankers Life Company did have any coverage at all under the Union Automobile Indemnity Association policy. The Bankers Life was covered by a policy with the Continental Casualty Company whose duty it was to defend. The defendant has no ground for complaint because he was defended by the company which insured him. The Continental Casualty Company has no legal grounds for complaint. It received premiums for assuming the responsibility of protecting the Bankers Life Company and had a policy sufficient to cover the claim of the Truex suit. We cannot construe the two policies to mean that it was the duty of the Union Automobile Indemnity Association to defend an action and plead on behalf of the Bankers Life Company that it was not legally responsible for the operation of the car at the time and thus remove the only ground for interposing any suit at all and particularly in view of the fact that it would be to the advantage of the Union Automobile Indemnity Association to have the Continental Casualty Company admit that the Bankers Life was legally responsible for operation of the car. If this were contended by the defendant-appellee herein the Continental Casualty Company would be liable under the terms of the Union Automobile Indemnity Association policy to pay five-sixths of the expenses, judgment, interest and costs.

From a consideration of the plaintiff's amended complaint and exhibits attached thereto, considered in the light most favorable

coverage to an employer or employee as an additional benefit. In the terms of the above coverage, it is stated that the plaintiff is passing upon the allegations of the defendant, and that the defendant is pledged will be considered as an additional benefit. The burden rested upon the plaintiff to show that the defendant was covered by the terms of the policy. It was found that the plaintiff was covered by the policy, and that the defendant was not. The plaintiff was awarded damages of \$10,000. The defendant was awarded costs of \$1,000. The court found in favor of the plaintiff.

to the plaintiff as to facts well pleaded and not as to conclusions, we find that the complaint is subject to the objection of defendant's motion to strike for failure to state a cause of action and that the motion was properly sustained by the Trial Court and the suit dismissed at the costs of plaintiff.

The judgment of the Circuit Court of McLean County is therefore affirmed.

JUDGMENT AFFIRMED.

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C
STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

February Term, A. D. 1945

Term No. 44024

Agenda No. 16.

LAZETTA GODFREY,

Plaintiff-Appellant,

vs.

ALBERT W. GODFREY,

Defendant-Appellee.

326 I.A. 250

Appeal from the

City Court of the

City of East St.

Louis, Illinois.

BRISTOW, P. J.

In 1935 Albert W. Godfrey, the present appellee, commenced an action for divorce in the City Court of East St. Louis, Illinois. Lazetta Godfrey, his wife and present appellant, filed an answer denying any charges of desertion, and also filed a cross complaint, praying for separate maintenance. The chancellor in that proceeding found against Lazetta on her cross complaint, dismissing it for want of equity, and found her guilty of desertion, and granted Albert W. Godfrey a divorce on his original bill.

In the decision rendered by this court in the case entitled Godfrey vs. Godfrey 284 Ill. App. 298, the decree of the City Court was reversed, and cause was remanded for new trial. Upon a retrial of this cause on November 4, 1939, the City Court of East St. Louis entered a decree finding Lazetta's husband to be living separate and apart from her without her fault and ordered Mr. Godfrey to pay his wife \$75.00 per month as separate maintenance.

On January 29, 1944 appellant filed her petition in the City Court of East St. Louis asking for modification of the separate maintenance decree and that appellee be required to pay her more

money. This petition contained the usual averments, namely, that her circumstances had changed so materially and in view of the increased cost of living, and her recent ill health, the monthly allowance of \$75.00 was inadequate, and that appellee was better able to pay. Appellee filed his answer to this petition denying generally all claims made by his wife. A hearing was had in the City Court upon this petition and answer, whereupon appellant's petition was denied. An appeal lands this dispute in this court for its second appearance.

The evidence on behalf of Lazetta Godfrey discloses that at the time of the original allowance of \$75.00 per month, she was living with one of two daughters who at that time was not married. Her name is Ilah Fay. Appellant and Ilah then lived on St. Clair Avenue, where the latter paid the rent. Ilah and her sister Olive owned an eating place in East St. Louis called "The Cars". Mrs. Godfrey was permitted to eat there without charge. It also appears that Ilah assisted in paying many of the necessary household expenses such as laundry, electricity and telephone. In May, 1943, Ilah was married and she and her husband resided in St. Louis, Mo. The girls, Ilah and Olive, sold their eating place "The Cars", consequently the assistance appellant received from her daughters was discontinued.

The evidence further discloses that Mrs. Godfrey, since the entry of the decree in 1939, has become afflicted with arthritis which causes pain in and affects the use of her knees and back; that for the past two years she has been under the care of Doctors Huber and Cannady; that their unpaid bills are \$39.00 and \$49.00 respectively.

Since 1943 appellant has resided in an apartment on Tenth Street where the monthly rental is \$45.00. It further appears,

without dispute, that her other necessary monthly items of expense are; electricity \$5.38; telephone \$3.50; laundry \$10.00; clothing \$25.00; food \$30.00. That alone totals about \$120.00. Then there is your doctors' bills, amusements, travel expense and many other items too numerous to mention. One must only live and not be blind to the truth to realize what it really does cost to live now-a-days. Mr. and Mrs. Godfrey had been accustomed to associating with the best people in East St. Louis and enjoying the pleasures and comforts of living that their friends enjoyed.

To further sustain her proof of right to relief, under Section 60, appellant called appellee and sought to question him about his present financial position. She had alleged in her petition that his total annual income was \$20,000; that he operated a large stock farm in Jersey County; that he is an officer in Robertson's Inc., which is a large general store in East St. Louis, and that as a stockholder in the corporation he derived \$12,000 per year income and that in addition he drew a substantial monthly salary and that he is well able to pay her \$200 per month. Under cross examination appellee was asked what his income was for 1943. He stated that he did not think he should answer that. Then he was asked what income tax he had paid for 1943 and he refused to answer, whereupon his counsel, Miss Connole, had the following to say, "Object to the question as immaterial. We haven't said he couldn't afford to pay what you are asking."

The defendant had very little to offer by way of defense. Mr. Godfrey complained that his wife was always picking on him; that she was continually embarrassing him by calling by telephone and approaching him personally, in the presence of friends, requesting more money and making threats that she would break him. When pressed on cross-examination to be specific about this as to

time and place and persons present, his memory wholly failed him.

Another circumstance that seemed to irk Mr. Godfrey is that his wife lives in a nice, five-room apartment, at the cost of \$45.00 per month, while he is contented to live in one room for which he pays only \$20.00 per month. The evidence discloses that Mrs. Godfrey rents one room for \$5.00 per week when she can find a tenant. At the time of the hearing there was a "Room for Rent" sign in the window. Let us quote from the argument made by Mr. Godfrey's attorneys in their printed argument: "About the only difference in the record of facts in the present suit from that originally given in support of the original decree is that the plaintiff now rents a five-room flat, maintains a notice in the window 'Rooms to Rent', and expects her husband to maintain her in that business. The law contemplates that the husband shall 'supply reasonable separate maintenance' for his wife, which would not include the conducting of a business and especially one that appears to be a loss. It is not necessary that the plaintiff go into business of renting property and expect the husband to maintain her in such business." The facts appearing undisputed in the record must be stretched clear out of shape to support such a feeble argument. Without prolonging this opinion unduly, suffice it to say that all the other defenses argued on behalf of the appellee are of the same weight and consequence.

We are of the opinion that the finding and decree entered herein are against the manifest weight of the evidence. We are convinced that Mr. Godfrey receives a large income and Mrs. Godfrey is entitled to a much larger allowance than she has been receiving. A citation of authorities is deemed superfluous to sustain this finding, but simple justice demands it.

The decree of the City Court of East St. Louis in this case is reversed and this cause is remanded to that court with directions to enter a decree allowing appellant petition.

Abstract.

FILED

Mar 5 1945

Stanley R. Brown

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

326 I.A. 251

43114

NATHAN H. GLASS, individually
and doing business as 1st
Mortgage Investment Company,
Appellant,

v.

LIBERTY NATIONAL BANK OF CHICAGO,
as Trustee under the provisions
of the Trust Agreement dated
November 30, 1940, and known as
Trust No. 3190, MORRIS S. BROMBERG
and CHARLOTTE BROMBERG,
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

278

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Nathan H. Glass, a real estate broker, brought suit against Morris S. Bromberg and others as owners of an apartment building, commonly referred to as the "Greenview and Schreiber" building, in Chicago, for commission on the sale of the building by Bromberg to Alfred L. Rouske, claiming that he had submitted the property by letter to Harold A. Fein, an attorney, at the latter's suggestion, for a client of Fein, and that the property was shortly thereafter sold directly by Bromberg to Rouske, Fein's client. Under a letter of indemnification given by the purchaser, Fein defended the action on behalf of his client. Trial by the court without a jury resulted in a finding and judgment for defendants, from which plaintiff has taken an appeal.

The apartment building, located at the southwest corner of Greenview and Schreiber avenues in Chicago, was acquired by Bromberg and others in 1940. The title thereto was placed in a trust with Liberty National Bank of Chicago, of which Bromberg became the sole beneficiary. Glass and other brokers were trying to sell the property for Bromberg and had obtained from him full data as to the condition of the building, its income and expenses, taxes, improvements and financial structure. Bromberg had known Glass for

82-14-381

43114

NATHAN H. GLASS, Individually
and doing business as late
Mortgage Investment Company,
Plaintiff,

vs.
LIBERTY NATIONAL BANK OF CHICAGO,
as Trustee under the provisions
of the Trust Agreement dated
November 3rd, 1940, and also as
Trustee of the Trust Agreement
dated May 1st, 1941, on the one
hand, and

Appellees.

That Nathan H. Glass, Plaintiff, and Liberty National Bank of Chicago, Appellees, are owners of an apartment building, known as the "Greenwich" building, located at the corner of Greenwich and Dearborn streets in Chicago, Illinois. The building was built by the Plaintiff, Nathan H. Glass, and was placed in a trust with Liberty National Bank of Chicago, of which Plaintiff became the sole beneficiary. Glass and other brokers were trying to sell the property for Dearborn and had obtained from him full data as to the condition of the building, its income and expenses, taxes, improvements and financial structure. Plaintiff had known Glass for some time and was acting as his attorney in the matter of the building. Plaintiff had advised the Defendant, Liberty National Bank of Chicago, that he had advised the property to Nathan H. Glass, an attorney, at the Plaintiff's suggestion, for a client of Plaintiff, and that the property was being sold to the Defendant, Liberty National Bank of Chicago, directly by Plaintiff to the Defendant, Liberty National Bank of Chicago, and that the Defendant, Liberty National Bank of Chicago, had received a letter of authorization from the Plaintiff, Nathan H. Glass, to defend the action on behalf of the Plaintiff, Liberty National Bank of Chicago, and that the Defendant, Liberty National Bank of Chicago, had received a judgment for the Plaintiff, Nathan H. Glass, in a lawsuit against the Defendant, Liberty National Bank of Chicago, from which Plaintiff had taken an appeal. The apartment building, located at the southeast corner of Greenwich and Dearborn streets in Chicago, was acquired by Plaintiff and others in 1941. The building was placed in a trust with Liberty National Bank of Chicago, of which Plaintiff became the sole beneficiary. Glass and other brokers were trying to sell the property for Dearborn and had obtained from him full data as to the condition of the building, its income and expenses, taxes, improvements and financial structure. Plaintiff had known Glass for some time and was acting as his attorney in the matter of the building. Plaintiff had advised the Defendant, Liberty National Bank of Chicago, that he had advised the property to Nathan H. Glass, an attorney, at the Plaintiff's suggestion, for a client of Plaintiff, and that the property was being sold to the Defendant, Liberty National Bank of Chicago, directly by Plaintiff to the Defendant, Liberty National Bank of Chicago, and that the Defendant, Liberty National Bank of Chicago, had received a letter of authorization from the Plaintiff, Nathan H. Glass, to defend the action on behalf of the Plaintiff, Liberty National Bank of Chicago, and that the Defendant, Liberty National Bank of Chicago, had received a judgment for the Plaintiff, Nathan H. Glass, in a lawsuit against the Defendant, Liberty National Bank of Chicago, from which Plaintiff had taken an appeal.

several years, and in September 1942 told him that he needed money and desired to sell the property at a price which would net him \$50,000 after deducting broker's commission. Glass then interviewed a number of prospective purchasers and showed them the building by appointment with a resident manager to whom Bromberg had referred him.

It appears from the undisputed evidence that on October 14, 1942 Glass called Fein on the telephone with respect to a mortgage that Fein's client had purchased, and Glass testified that in the course of that conversation Fein said: "If you have any buildings to submit to me, my client is a ready buyer, has cash and will make a quick deal." Glass then inquired of Fein whether he had ever heard of the Greenview and Schreiber building. Fein replied that he had not, and Glass thereupon proceeded to tell him some of the facts about the building, but was interrupted by Fein who said: "Well, don't tell me all these facts over the phone. Why don't you submit to me a complete statement of the building?" Glass replied that he would do so, and testified that Fein told him "he would submit it to his client." Immediately thereafter Glass addressed the following letter to Fein at his office in Chicago: "Pursuant to our telephone conversation of this date [October 14, 1942], we are pleased to enclose herewith our memorandum set-up on the property located on the southwest corner of Greenview and Schreiber avenues. This property can be delivered at once, no bidding involved and can be delivered for \$52,500. Your fee for representing your client in this matter will be \$500 and ~~the~~ will be paid out of the proceeds of the sale if and when the sale is consummated with your client. We would appreciate an early inspection of this property and hope it meets with your client's approval." With the letter Glass also submitted to Fein particularized data showing the location

of the building, its approximate age, the size of the lot, a description of the neighborhood, detailed facts as to the 18 apartments contained within the building, the manner in which they had recently been modernized by the installation of new stoves, individual refrigerators, metal kitchen and table-top cabinets with drawers and indirect lighting, as well as a description of the exterior of the building, showing that it had recently been tuckpointed, the windows and door openings caulked, the exterior entirely cleaned by stone sand blasting, and the exterior woodwork and porches repaired and painted. Also enclosed with the letter was another sheet containing information as to the bathroom equipment, lavatories, refrigerators, tile floors and other accessories, showing the "frozen" rentals in detail for each apartment, aggregating \$12,030 annually, stating the fair market value of the building at \$60,000, the details as to the mortgage indebtedness, the detailed operating expenses totaling \$4,218, and taxes for the year 1941 amounting to \$1,362⁵. Both of the enclosures were signed by Glass and transmitted with his letter to Fein.

Glass received no response to his letter, but on October 21, 1942, a week after the letter was mailed, he went to the escrow department of the Chicago Title and Trust Company, where he found Fein and Bromberg entering into an escrow agreement for the purchase of the property by Fein's client, Alfred Rouske. Glass took Bromberg aside and showed him a copy of his letter and memorandum of October 14. Bromberg thereupon exhibited the letter to Fein, who, according to Glass, stated, "I have nothing to do with this." Bromberg then asked Fein if he had received the letter, but Fein did not answer, and Bromberg then said: I want to know Mr. Glass's position. I am an attorney, and I know that he is entitled to a fee on brokerage, if that is true." Further conversation ensued,

of the building, its approximate age, the size of the lot, a description of the neighborhood, detailed facts as to the 18 apartments contained within the building, the manner in which they had recently been modernized by the installation of new stoves, individual refrigerators, metal kitchen and table-top cabinets with drawers and interior lighting, as well as a description of the exterior of the building, showing that it had recently been repainted, the windows and door openings caulked, the exterior entirely cleaned by stone and blasting, and the exterior woodwork and porches repaired and painted. Also enclosed with the letter was another sheet containing information as to the bathroom equipment, lavatories, refrigerators, tile floors and other accessories, showing the "ironment" rentals in detail for each apartment, aggregating \$12,000 annually, stating the fair market value of the building at \$60,000, the details as to the mortgage indebtedness, the detailed operating expenses totaling \$4,218, and taxes for the year 1941 amounting to \$1,500. Both of the enclosures were signed by Glass and transmitted with his letter to Wein. Glass received no response to his letter, but on October 21, 1942, a week after the letter was mailed, he went to the escrow department of the Chicago Title and Trust Company, where he found John and Bromberg entering into an escrow agreement for the purchase of the property by John's client, Alfred Poulos. Glass took Bromberg aside and showed him a copy of his letter and memorandum of October 14. Bromberg thereupon exhibited the letter to Wein, who, according to Glass, stated, "I have nothing to do with this." Bromberg then asked Wein if he had received the letter, but Wein did not answer, and Bromberg then said: I want to know Mr. Glass's position. I am an attorney, and I know that he is entitled to a fee on prothonotary, if that is true." Further conversation ensued,

during which Glass made a specific demand for commission for the sale to Fein or his client, with the result that Bromberg asked for, and Fein gave him, a written indemnification, on behalf of Rouske, against Glass's claim.

When called as a witness, Bromberg testified that when Glass told him in the escrow department that he had submitted the property to Fein, he asked Fein and his client, Rouske, whether Glass had in fact submitted the property to either one of them, that Fein said "No," and agreed to give Bromberg the letter of indemnification. On cross-examination Bromberg testified as follows: "Q. And he [Glass] said, 'I submitted this proposition to Harold Fein,' and then you asked Fein if that was so? A. That is right. Q. What did Fein say? A. He said it is not true. Q. Then you asked for a letter of indemnification? A. I asked for the letter from Fein? No, from Fein's client, Rouske. Q. Indemnifying you against any claim for commission based on that statement of Fein's? A. I did, that is right." The property was sold by Bromberg to Rouske for \$50,000 as the result of the agreement entered into in the escrow department of the Chicago Title and Trust Company on October 21, 1942.

Although Fein at first denied having received the letter of submission from Glass, he ultimately produced the letter, which had been in his possession continuously from the time it was sent until the date of the trial, and admitted having received it.

Concerning the meeting in the escrow department of the Chicago Title and Trust Company, Glass testified as follows: "I entered the Trust Department and spied Mr. Bromberg sitting at Mr. Owen's desk. I asked Mr. Owen's indulgence and asked if I couldn't speak to Mr. Bromberg. Mr. Bromberg asked me

to wait just a moment, he was talking to Mr. Fein. He got through and we stepped to one side and I said, 'Mr. Bromberg, I have a copy of a letter here that I wrote to Mr. Harold Fein. I would like you to look at it.' I showed him a copy of the submission. Mr. Bromberg looked at the letter, walked over to Mr. Fein and said, 'Mr. Fein, I have a copy of a letter that was addressed to you that Mr. Glass mailed you and I would like you to read^{it.}' Mr. Fein inspected the copy of the letter, threw it on the table, and said, 'I have nothing to do with this.' Mr. Bromberg said, 'Well, Mr. Glass purports to have written you a letter in respect to the sale, purchase of this property and I want to know whether or not you received it.' Mr. Fein wouldn't answer. He merely said, 'I have made arrangements with you to buy this property. Do you care to sell this property to me or don't you care to sell this property to me?' Mr. Bromberg says, 'I do want to sell you the property, but I do want to know Mr. Glass' position. I am an attorney, and I know that he is entitled to a fee on brokerage, if that is true.' With that Mr. Fein said, 'I am here to buy the property at the price we discussed, and if you don't want to sell me the property, I will leave,' and with that Mr. Fein picked up a check from the desk of Mr. Owen and said, 'Now, you either sell me this property or I will pick up my check.' So I said to Mr. Fein, 'You needn't scare anybody by picking up that check. You are here to buy the property, but if you buy the property, Mr. Bromberg sells the property, Mr. Bromberg owes me a commission.' Mr. Bromberg said, 'I will sell you the property providing you will protect me in respect to Mr. Glass.' So Mr. Fein said, 'Yes, I will give you a letter of indemnification to indemnify you against any action that Mr. Glass may bring.' With that, I said 'Mr. Bromberg, if you sell Mr. Fein or Mr. Fein's client, whomever he represents,

this building, you owe me a commission,' and Mr. Bromberg said 'If I do, you can sue me.' Mr. Fein said to Mr. Owen, 'Mr. Glass is not a party to this escrow. Will you please request him to leave.' I said to Mr. Fein, 'This is a public institution. I am here to talk to Mr. Bromberg in respect to this property and he will give me permission to do so and I will leave without being requested to' and I turned to Mr. Owen and said, 'You couldn't ask me to leave. I will leave just as soon as I am through, and I am through.' Then Mr. Fein said to Mr. Owen, 'Why don't you order him out.' Before Mr. Owen could say anything, I said, 'I am ready to leave, but in leaving, I want to tell you, everyone present here, that if this sale of this property is made, there is a commission owing me and I intend to collect.' At that point, I left and have not seen Mr. Fein until the last time in court."

Alfred L. Rouske, the purchaser, testified that he did not know Glass and first heard of the property on October 21. He then called Fein and asked him to find out who owned the property, and was later told that it was the Liberty National Bank as trustee; that he ascertained from a tenant that rent was being paid to Bromberg, an attorney, and in a telephone conversation with Fein, he inquired as to the sales price, income, taxes and expenses, and was told by Fein that the price was \$50,000, the income \$12,000, the taxes \$1,400 and the expenses approximately \$5,000. Fein was thereupon directed by Rouske to make a deal at \$50,000. Later that same day he met Bromberg and Fein at the latter's office, discussed the building expenses and tenants, and then went to the Chicago Title and Trust Company where an escrow was established and \$50,000 in currency was paid by him. Rouske further testified that the day he first heard of the property he saw the exterior of the building, the halls and part of the basement, but saw

none of the apartments.

Bromberg testified in substance that Fein came to his office October 21, asked about the property, stoves, refrigerators, remodeled apartments, leases, taxes and coal bills, and offered \$45,000, which he refused, saying the price was \$50,000. Fein wanted a fee of \$500, but Bromberg told him he would pay \$250. He stated that the first question he asked Fein, when he walked into his office, was whether the property had been submitted to him or his client by a broker, and that Fein answered "No."

It is Fein's contention that Rouske first learned about the property through Joseph Companion, one of the tenants, who told him the building was for sale, and it is urged that the facts and circumstances in evidence tend to support the conclusion that he did not submit to Rouske the information contained in Glass's letter, that Rouske learned of the property through other sources, that Glass was not the procuring cause of the sale and is therefore not entitled to the commission claimed. At the conclusion of the trial the court expressed the opinion that plaintiff had not made out a case against the defendants because all he did "was to send Fein a letter, and then Fein handled some real estate deal and sold the property"; that the evidence merely disclosed the letter from Glass to Fein, "and Fein using the information to his own advantage or the advantage of the purchaser here, Mr. Rouske, or whomever he represents"; and that in the absence of "at least indirect contact" between Glass and Rouske, the purchaser, plaintiff was not entitled to commission.

[1] The legal aspect of the case presents no difficulty. Plaintiff relies on the well established rule that his right to a commission as broker depends upon whether the sale was procured or effected through his efforts or through information derived

none of the apartments.

Thompson testified that he had been called to the office October 21, 1935, by a man, who he said was a broker, and who offered him \$4,000, which he refused. He then went to the office and saw the man again, who offered him \$2,500. He stated that the man then called him again and he walked into his office, where he was told that the man had been admitted to the office by a man named "Joe".

It is John's contention that he was called to the property through Joseph Thompson, one of the parties, who told him the man was coming to see him. He then went to the office and after a few minutes he was told that the man was not there and that he did not want to see him. Thompson then contacted in Glass's letter, that Joseph is one of the parties through other sources, that Glass was the promoter of the sale and is therefore not entitled to the commission of \$1,000. At the conclusion of the trial the court expressed the opinion that plaintiff had not made out a case against the defendants because all he did was to send them a letter, and then John handled some real estate deal and sold the property. The evidence merely disclosed the fact that Glass was a party and that he was using the information to his own advantage in the sale of the property here, it is known, or whatever he represents; and that in the absence of "at least in direct contact" between Glass and Joseph, the plaintiff was not entitled to commission.

The legal aspect of the case presents no difficulty. Plaintiff relies on the well established rule that his right to a commission as broker depends upon whether the sale was procured or effected through his efforts or through information derived

from him, and cannot be defeated by the owner's making a sale himself or through another broker or upon different terms; that it is not necessary that the purchaser be actually introduced to the owner by the broker or that the owner know at the time of his making the sale that the purchaser with whom he is dealing is the one found by the broker. Hafner v. Herron, 165 Ill. 242, Rigdon v. More, 226 Ill. 382, Adams v. Decker, 34 Ill. App. 17, Hutten v. Renner, 74 Ill. App. 124, and Finch v. Betz, 134 Ill. App. 471, sustain these propositions. In Cowan v. Day, 156 Ill. App. 105, it was held that where a broker is the procuring and efficient cause of the sale of property, he becomes entitled to his commissions; that all he is required to do is to find a purchaser for the property, and when he calls the purchaser's attention to the fact that the property is for sale he has performed on his part and is entitled to a commission. Defendant does not question these propositions of law, but predicates his defense on the contention that the purchase of the property by Rouske resulted from independent information obtained by him and Fein, entirely disassociated from the letter of submission by Glass with detailed information pertaining to the building.

[2] The question therefore presented is whether the sale of the property by Bromberg to Rouske was brought about or induced by the efforts of Glass through information derived from him and submitted to Fein for his client. The evidence discloses without question that Glass was employed by Bromberg, the owner of the property, to sell it for him; that in September 1942 Bromberg asked Glass if he could find a buyer for the building and told him he wanted a price, after deducting commissions, which would net \$50,000; that on October 14, 1942 Glass submitted the property to Fein for consideration and possible purchase by one of his clients, at Fein's request; that the information furnished to Fein was so complete and detailed that except for

verification of the figures and an examination of the premises, an intelligent opinion could be formed by a prospective purchaser^{as to} whether or not the property should be purchased. Whether by coincidence or otherwise, the interest of Fein and Rouske in the purchase of the property arose immediately after Fein received the submission from Glass. Rouske, the purchaser, testified that he first heard of the property on October 21, and according to Bromberg, Fein came to see him on the same day to inquire about the property. Immediately after visiting Bromberg, Fein reported to Rouske that the income of the building was \$12,000, the taxes \$1,400, the expenses approximately \$5,000 and the sales price \$50,000. With this information Rouske then decided to buy the building. It is hardly likely, however, that he would have done so without knowledge of the detailed breakdown of the financial status of the building, the income and expenses, the condition of the apartments, furnishings and equipment, and other information which was contained in Glass's submission and undoubtedly known to Fein. The court was evidently convinced that Fein had used the information received from Glass, either to his own advantage or that of the purchaser, Mr. Rouske, but decided in favor of defendants under the misapprehension of law that it was incumbent upon Glass to prove that he had had some contact with Rouske before the sale was consummated. It is difficult to believe that Rouske would have purchased the property after only a cursory examination of the exterior of the building, upon such short notice, without the detailed information that an intelligent purchaser would ordinarily require. It is clear that all the necessary information in great detail had been submitted to Fein, and whether or not Rouske was aware of the fact that Fein had received the information from Glass, it would be naive to assume that Fein did not use the details of Glass's submission in advising Rouske about such details as he undoubtedly needed

verification of the figures and an examination of the premises,
an intelligent opinion could be formed by a prospective pur-
chaser as to whether or not the property should be purchased. Further
by collusion or otherwise, the interest of him and others in
the purchase of the property was I believe entirely in re-
sult of the submission from Glass, and the purchase was, there-
fore, made in that belief of the fact that on October 21, and there-
after, the property was to be sold on the same day to the highest
bidder. I believe that the information which was given to him
reported to Glass that the income of the building was \$12,000,
the taxes \$1,400, the expenses of the property \$1,000, and the net
income \$9,600. This information was then decided to buy
the building. It is my belief, however, that he would have
done so without knowledge of the details of the finan-
cial status of the building, the income and expenses, the condi-
tion of the apartments, the heating and equipment, and other in-
formation which was contained in Glass's submission and undoubt-
edly known to him. The court was evidently convinced that Wein
had used the information received from Glass, either to his own
advantage or that of the purchaser, Mr. Roske, but decided in
favor of defendants under the interpretation of law that it was
incumbent upon Glass to prove that he had had some contact with
Roske before the sale was consummated. It is difficult to be-
lieve that Roske would have purchased the property after only
a cursory examination of the exterior of the building, upon such
short notice, without the detailed information that an intelli-
gent purchaser would ordinarily require. It is clear that all
the necessary information in great detail had been submitted to
him, and whether or not Roske was aware of the fact that Wein
had received the information from Glass, it would be naive to
assume that Wein did not use the details of Glass's submission
in advising Roske about such details as he undoubtedly needed

before making a decision to purchase. In view of the nature of the defense interposed, it would have been simpler for Fein to have admitted, from the outset, the receipt of Glass's letter and to have asserted that his client had never seen the letter, if that was a fact, and had learned about the property through other sources. Plaintiff's counsel suggests that Fein first denied the receipt of Glass's letter because as a lawyer he knew that since Glass had submitted the property, Bromberg would have raised the price to \$52,500 to take care of the commission and obtain \$50,000 net for himself; that in any event the most that Rouske would have to pay under his letter of indemnification would be the additional \$2,500; and that as between paying that sum immediately or speculating on the result of the lawsuit, Fein and Rouske "took the course where they had a chance to win." The amount of the commission is not questioned, and since as we view the record, the sale of the property by Bromberg to Rouske was brought about or induced through the efforts of Glass by means of information derived from him, he is entitled to the sum of \$2,500.

Accordingly, the judgment of the circuit court is reversed and judgment entered ~~here~~ for plaintiff in the sum of \$2,500 and costs.

4 JUDGMENT REVERSED AND JUDGMENT
ENTERED HERE FOR PLAINTIFF.

7 Sullivan, P. J., and Scanlan, J., concur.

before making a decision to purchase, in view of the nature
of the defense involved, it would have been a fair
thing to have admitted, from the outset, the weight of
Class's letter and to have admitted that his letter had
never seen the letter, if there was a fact, which I should
have told the jury, though I am not sure. I should have
suggested that I had the weight of Class's letter
because as a lawyer he knew that Class had written the
property, perhaps would have told the jury that I had
taken care of the situation and obtain \$2,500 for himself;
that in any event the Court that would have to pay money
his letter of indemnification would be the defendant's liability;
and that as a lawyer he knew that and he would be expected
on the result of the law, and he would know the course
where they had a chance to win. The amount of the indemnity
is not questioned, and since as we view the record, the
of the property by property to make was brought about or
induced through the efforts of Class by means of information
derived from him, he is entitled to the sum of \$2,500.
Accordingly, the judgment of the Circuit Court is
reversed and judgment entered here for plaintiff in the sum
of \$2,500 and costs.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at New York, New York, this 10th day of June, 1934.

W. Sullivan, P. J., and George, J., concur.

VERNON R. MacDONALD,

Appellee,

v.

CHICAGO LAW PRINTING COMPANY,
a corporation,

Appellant.

32 1.1.2021

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for a commission upon an order for printing which plaintiff claims to have procured for defendant. In a trial by the court without a jury judgment was for plaintiff in the amount of \$528.11, and defendant appeals.

The disputed printing contract was executed April 12, 1938, between the Year Book Publishing Company, Inc. and defendant. The contract covered the printing of a series of medical Year Books which had for some years previous been printed by M. & L. Type-setting Company. The disputed contract was terminated October 7, 1938, because of dissatisfaction on both sides. The amount paid to the defendant under the contract for that term was \$5,281.13, ten percent of which is the amount of the judgment entered. The printing work was resumed by defendant a few months after the termination of the first contract. This fact sheds light upon the question involved.

The question presented here is whether the printing business covered by the contract was procured for defendant by plaintiff or by others.

Previous to the negotiations for the disputed contract, President Hart of the Defendant Company had employed plaintiff to solicit commercial printing business and supplied him with business cards which bore his name in large type and defendant's name in

VERNON H. MASON, JR.

Appellee,

v.

CHICAGO LAY BROTHERS COMPANY,
a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

OF COOK COUNTY,

No. 12,345 K. L. & L. TYPE-SETTING COMPANY, INC.

This is an action for a commission upon an order for

printing which plaintiff claims to have procured for defendant.

In a trial by the court without a jury, judgment was for plaintiff

in the amount of \$288.11, and defendant appeals.

The disputed printing contract was executed April 15,

1938, between the Y. & B. Book Publishing Company, Inc. and defendant.

The contract covered the printing of a series of regional Year Books

which had for some years previous been printed by K. L. & L. Type-

setting Company. The disputed contract was terminated October 7,

1938, because of dissatisfaction on both sides. The amount paid

to the defendant under the contract for that term was \$5,281.12,

ten percent of which is the amount of the judgment entered. The

printing work was resumed by defendant a few months after the

termination of the first contract. This fact sheds light upon the

question involved.

The question presented here is whether the printing

business covered by the contract was procured for defendant by

plaintiff or by others.

Previous to the negotiations for the disputed contract,

President Hart of the Defendant Company had employed plaintiff to

solicit commercial printing business and supplied him with business

cards which bore his name in large type and defendant's name in

small type. Thurman and Porter were typesetters for several years before 1938, and had set type for the Year Book under a subcontract with the M. & L. Company. When M. & L. Company ceased doing the work, Thurman and Porter lost the typesetting contract. President Simons of the Year Book Publishing Company in February 1938, promised Thurman and Porter that he would place the printing of the Year Books wherever it was to their advantage if prices, services and other factors involved were equal. Following this commitment Thurman had a vacation for a few weeks and was then employed on a temporary basis at the Conkey Printing Company in Hammond, Indiana, where plaintiff's son was a co-employee. The Superintendent of the Conkey Company told Thurman that if he could place the Year Book with Conkey, a permanent situation would be arranged for him. Plaintiff's son overheard this conversation and suggested that Thurman place the business with the defendant. The next morning Thurman called Hart and discussed the business and arranged to see him the following day. Plaintiff called on Thurman and discussed the business before the latter saw Hart.

Plaintiff testified that several weeks after his employment with defendant began, he spoke to Hart about the Year Book work; that he told Hart that Simons had told him there would be 12 or 14 books a year; that several days later they discussed the price and he advised Hart that the estimate which defendant's superintendent and Hart had set up would bear nine cents more per page in view of the prices M. & L. had charged; and that he had submitted the price to Simons and the printing contract resulted. He said he learned of the Year Book job through his son, then saw Simons and again talked to his son at Conkey's who told him of Thurman and the latter's desire for a permanent position; that his son did not say Thurman was authorized to place the printing contract; that

small type. Thurman and others were typewriters for several years before 1938, and had set type for the West Book under a subcontract with the H. L. Company. When H. L. Company ceased doing the work, Thurman and Porter lost the typewriting contract. President Simon of the Year Book Publishing Company in January 1939, promised Thurman and Porter that he would place the printing of the Year Book wherever it was to their advantage if their services and other factors involved were equal. Following this commitment Thurman had a vacation for a few weeks and was then employed on a temporary basis at the Conkey Printing Company in Hammond, Indiana, where Plaintiff's son was a co-employee. The President of the Conkey Company told Thurman that if he could place the Year Book with Conkey, a permanent situation would be arranged for him. Plaintiff's son overheard this conversation and suggested that Thurman place the business with the defendant. The next morning Thurman called Hart and discussed the business and arranged to see him the following day. Plaintiff called on Thurman and discussed the business before the latter saw Hart. Plaintiff testified that several weeks after his employment with defendant began, he spoke to Hart about the Year Book work; that he told Hart that Simon had told him that he would place the Year Book a year; that several days later they discussed the price and he advised Hart that the estimate which defendant's agent, Plaintiff and Hart had set up would bear nine cents per page in view of the price H. L. had charged; and that he had submitted the price to Simon and the printing contract resulted. He said he learned of the Year Book job through his son, then saw Simon and again talked to his son at Conkey's who told him of Thurman and the latter's desire for a permanent position; that his son did not say Thurman was authorized to place the printing contract; that

plaintiff called on Thurman and discussed the work with him, saying he had estimated on it and told him that he had discussed a permanent assignment for him with Simons and would make every effort to secure a permanent position. He later saw Thurman and Porter, but said neither one told him of any authority to place the contract nor of any connection of the Year Book Publishers, Inc. He denied that Simons told him that the work was already committed to Thurman and Porter and said that Simon had arranged for him to get some samples of the Year Book to use in setting up the estimate.

Simons testified he saw plaintiff in early April, 1938 and talked to him about the Year Book work and that plaintiff was told that Simons was already committed to Thurman and Porter. He said he did not remember details, but said he thought plaintiff appeared, not as defendant's representative, but as a broker and presumed they had talked about Simons' previous dealings with M. & L. He admitted that plaintiff may have been given sample books and did not deny plaintiff submitted an estimate, saying that if one was submitted it would go to Mr. Shaw, but that any final offer would be to Simons. Simons did not say with whom final negotiations for the contract were carried on.

Thurman testified that plaintiff called on him, representing himself as a substantial stockholder of the defendant; that he produced a card and discussed the Year Book Business; that Thurman had sample books which he showed plaintiff and that plaintiff was vague about the price and Thurman told him that he would contact Hart; that he did so and saw Hart the next day; that plaintiff appeared when he and Hart were discussing the work; ^{and} that Thurman introduced Hart to Simons and that from that point Hart and Simons negotiated the contract. He said he learned from Hart that plaintiff had grossly

plaintiff called on Thurman and discussed the work with him, saying he had estimated on it and told him that he had discussed a permanent assignment for him with Simons and would make every effort to secure a permanent position. He later saw Thurman and Porter, but said neither one told him of any authority to place the contract nor of any connection of the Year Book Publishing Co., Inc. He testified that Simons told him that the work was already committed to Thurman and Porter and said that Simons had arranged for him to get some samples of the Year Book to see in setting up the contract.

Simons testified he saw plaintiff in early April, 1938 and talked to him about the Year Book work and that plaintiff was told that Simons was already committed to Thurman and Porter, as well as he did not remember exactly, but said he thought plaintiff was not as defendant's representative, but as a broker and arranged they had talked about Simons' previous dealings with Year Book. He admitted that plaintiff may have been given sample books and did not deny plaintiff submitted an estimate, saying that it was submitted it would go to Mr. Shaw, but that any final offer would be to Simons. Simons did not say with whom final negotiations for the contract were carried on.

Thurman testified that plaintiff called on him, representing himself as a substantial stockholder of the defendant, that he produced a card and discussed the Year Book business; that Thurman had sample books which he showed plaintiff and that plaintiff was vague about the price and Thurman told him that he would contact Hart; that he did so and saw Hart the next day; that plaintiff appeared when he and Hart were discussing the work; ^{and} that Thurman introduced Hart to Simons and that from that point Hart and Simons negotiated the contract. He said he learned from Hart that plaintiff had grossly

misrepresented himself and ignored plaintiff's calls thereafter. Thurman and Porter went to work for plaintiff the day following the execution of the printing contract and were paid \$6 per week above the scale according to Thurman for procuring the Year Book business and when the contract was canceled he stayed on at the normal scale. He said he saw the contract drawn between Simon and Hart and that his and Porter's names were written in it. He denied that plaintiff told him he had already seen Simons about the work. He said that he tried to place the Year Book business in Chicago, but found no printers equipped to do it and, although he worked at Conkey's for several weeks, he was actually trying to place the Year Book business.

Hart testified that Thurman told him he had the placing of the Year Book business; that they met and he "thought" Thurman introduced him to Simons and that after Thurman "introduced him", he and Simons worked out the contract; that plaintiff saw Thurman and Hart together and said, "Oh, I see you have gotten together"; and that he next saw plaintiff in 1939 when plaintiff claimed and Hart denied that he had commission coming for procuring the business. Hart denied that plaintiff procured the work or helped set the price and said that plaintiff did not seem familiar with the work, so that Hart talked over the price with Thurman. Plaintiff does not say he brought Simons and Hart together. The contract clearly indicates that Simon and Hart discussed the terms the day preceding the execution of the contract.

Simons did not testify that plaintiff did not submit a price and Shaw of the Year Book Publishers, Inc. did not testify. It is clear that plaintiff talked to Simons before the contract was made and since Simons admits that sample books may have been given to plaintiff, it is clear that Thurman and Porter did not have the exclusive commitment to place his business and Simons does not say

misrepresented himself and ignored plaintiff's oral agreement. Thorman and Porter went to work for plaintiff the day following the execution of the printed contract and were paid \$1 per week above the scale according to Thorman for procuring the Year Book business and when the contract was cancelled he stayed on at the normal scale. He said he saw the contract drawn between Simon and Hart and that his and Porter's names were written in it. He denied that plaintiff told him he had already seen Simon about the work. He said that he tried to place the Year Book business in Chicago, but found no printers equipped to do it and, although he worked at Gougeon's for several weeks, he was actually trying to place the Year Book business. Hart testified that Thorman told him he had the printing of the Year Book business; that they met and he "thought" Thorman introduced him to Simon and that after Thorman "introduced him", he and Simon worked out the contract; that plaintiff saw Thorman and Hart together and said, "Oh, I see you have gotten together"; and that he next saw plaintiff in 1939 when plaintiff claimed and Hart denied that he had commission coming for procuring the business. Hart denied that plaintiff procured the work or helped set the price and said that plaintiff did not seem familiar with the work, so that Hart talked over the price with Thorman. Plaintiff does not say he brought Simon and Hart together. The contract clearly indicates that Simon and Hart discussed the terms the day preceding the execution of the contract. Simon did not testify that plaintiff did not submit a price and Shaw of the Year Book Publishers, Inc. did not testify. It is clear that plaintiff talked to Simon before the contract was made and since Simon admits that sample books may have been given to plaintiff, it is clear that Thorman and Porter did not have the exclusive commitment to place his business and Simon does not say

the commitment to them was exclusive. Neither Thurman nor Hart could deny that plaintiff was authorized to submit an estimate to Simons. Thurman said first that he spoke to and made an appointment with Hart before plaintiff called. He later said he called Hart and made the appointment because plaintiff was so vague about an estimated price for the Year Books. Hart says plaintiff did not help make up the price because plaintiff did not know about the work and that Thurman helped set up the price. Thurman says that all he did was introduce Simon and Hart and they negotiated from that point. Hart's testimony is not consistent with plaintiff's activity in the transaction. He had talked with Simon about the M. & L. business and had been in the printing business for many years. Moreover, Hart's story about the setting of the price coincides substantially with plaintiff's. It is clear that plaintiff took some part in the transaction, had discussed the business with the principals and with Thurman and had been offered \$100 by Hart. It is true that the contract states that Thurman and Porter were to enter defendant's employ, and plaintiff, said he had talked to both Simon and Hart about placing them, and it was to the advantage of both Simon and Hart to have the experienced and efficient type-setters. Thurman's testimony is not convincing to confirm an exclusive commitment. He says he tried to locate a place in Chicago for the Year Book business, but found no plant equipped. This is not consistent with the testimony that he did not learn of defendant which was equipped and located in Chicago - until plaintiff's son suggested it. He says that he worked several weeks at Conkey's, although he was really trying to place the work. This is hardly consistent with his own testimony that Conkey asked him to place the work with it, promising a permanent situation. His lack of effort to execute the commitment is consistent with plaintiff's story that Simons authorized him to figure on the work.

the commitment to them was not real. Plaintiff Thorman has said that he could deny that plaintiff's statement is correct in relation to the commitment. Thorman said that he spoke to and with the commitment with Hart before plaintiff called. He said that he called Hart and made the commitment. Plaintiff Thorman said that he was estimated price for the work. He said that he was help make up the price. Plaintiff Thorman said that he was and that Thorman helped out in the work. Plaintiff Thorman said that he was introduced to him and that he was introduced from that point. Hart's testimony is not consistent with plaintiff's activity in the transaction. He had talked with Simon about the work. Plaintiff Thorman had been in the printing business for many years. Plaintiff Thorman's story about the activity of the printer is inconsistent with plaintiff's. It is clear that plaintiff took some action in the transaction, had discussed the business with the printer and with Thorman and had been offered the work. It is true that the contract states that Thorman had ordered work to be printed and that plaintiff, said he had asked to look at the work and that about placing them, and it was to be a package of work which had Hart to have the experienced and efficient printer. Plaintiff Thorman's testimony is not convincing to confirm an exclusive commitment. He says he tried to locate a place in Chicago for the work but found no plant equipped. This is not consistent with the testimony that he did not learn of defendant which was equipped and located in Chicago - until plaintiff's son suggested it. He says that he worked several weeks at Conkey's, although he was really trying to place the work. This is hardly consistent with his own testimony that Conkey asked him to place the work with it, promising a permanent situation. His lack of effort to execute the commitment is consistent with plaintiff's story that Simon authorized him to figure on the work.

There is no question but that plaintiff performed services in connection with the transaction. While he makes no claim that he brought the contracting parties together, that was not essential if he, in fact, was authorized by Simons to submit an estimate on behalf of defendant and thereafter did submit an estimate which resulted in the contract. The most damaging inference against plaintiff is his calling upon Thurman. If he called on him, knowing that he was a factor in control of the business and worked with him as plaintiff argues in this court and used information obtained from him and obtained his help through efforts to place him in the typesetting work, these facts would not militate against him if, as a result of them, he obtained the business for defendant. Plaintiff, however, did not testify that this was the case. He denies that his son told him Thurman had the placing of the job. He denies that Thurman and Porter told him they had the placing of the job and says that Thurman did not say he had any connection with the Year Book Publishers. According to plaintiff, his reason for going to see Thurman was that his, plaintiff's, son told him that Thurman wanted a permanent job. This testimony is difficult to reconcile with plaintiff's discussion with Thurman of the Year Book business, his call on Simons and his estimate. Plaintiff says that he had learned through his son that Thurman worked on the Year Books. This is consistent with plaintiff's testimony that, with his experience, Thurman would be a valuable man in doing the work.

Plaintiff was the sole witness in his behalf upon the issue involved here and his testimony was not clear or definite. The testimony for defendant was not definite on most points either. Simons did not remember details and we have pointed out discrepancies in Thurman's testimony. Moreover, Hart's testimony that Thurman introduced him to Simons was indefinite and there were inconsistencies

introduced him to Simons was indefinite and there were inconsistencies in Thurman's testimony. Moreover, Hart's testimony that Thurman did not remember details and we have pointed out discrepancies in testimony for defendant was not definite on most points either. Issues involved here and his testimony was not clear or definitive. The Plaintiff was the sole witness in his behalf upon the Thurman would be a valuable man in doing the work. is consistent with Plaintiff's testimony that, with his experience, learned through his son that Thurman worked on the Year Books. This his call on Simons and his estimate. Plaintiff says that he had with Plaintiff's discussion with Thurman of the Year Book business, wanted a permanent job. This testimony is difficult to reconcile to see Thurman was that his, Plaintiff's, son told him that Thurman Year Book Publishers. According to Plaintiff, his reason for going and says that Thurman did not say he had any connection with the that Thurman and Porter told him they had the placing of the job that his son told him Thurman had the placing of the job. He denies this, however, did not testify that this was the case. He denies as a result of them, he obtained the business for defendant. Plaintiff representing work, there is no doubt that Plaintiff would not testify against him if from him and obtained his help through efforts to place him in the as Plaintiff argues in this court and used information obtained that he was a factor in control of the business and wrote with him Plaintiff is his calling upon Thurman. It is said on this, knowing resulted in the contract. The most damaging inference against behalf of defendant and therefore did submit an estimate which it he, in fact, was authorized by Simons to submit an estimate on brought the contracting parties together, that was not essential in connection with the transaction. While no other claim that no There is no question but that Plaintiff performed services

in Hart's testimony. We realize that the trial court was in a better position than we are to judge the credibility of these witnesses and that all reasonable presumptions must be indulged in favor of the judgment. Defendant does not contend plaintiff did not prove a prima facie case. We believe, however, that plaintiff has not proved by a preponderance of the evidence, that he obtained the business for defendant. There should have been clearer and more definite proof of the facts necessary to prove that ultimate fact. For this reason we believe that justice requires a reversal of the judgment and a retrial of the issue.

JUDGMENT REVERSED AND CAUSE REMANDED.

BURKE, P.J. AND LUPE, J. CONCUR.

[illegible]

42889

THERMAL-TITE INSULATION COMPANY,
a corporation,

Plaintiff - Appellant,

v.

AMERICAN INSULATION CORPORATION,

Defendant - Appellee.

32 I.A. 252²

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

304

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for the sale price of insulating material, with a counter claim for commissions under an alleged verbal contract. Plaintiff's claim was not disputed and a judgment for \$384 was entered in its favor. The counter claim was resisted by counter defendant, plaintiff, and it appeals from a judgment on the counter claim of \$250. We shall refer to plaintiff and counter defendant as the Company and to the defendant and counter plaintiff as the Corporation.

The Company contends there was no contract and that, even if there were, it would have come within the prohibition of Section 1 of the Statute of Frauds (Chap. 59, Ill. Rev. Stats.) and Section 4 of the Uniform Sales Act (Chap. 121 $\frac{1}{2}$, Ill. Rev. Stats.) and that accordingly, the Corporation should not recover.

The Corporation was a jobber or broker through which the Company sold rock wool for insulation. The Corporation would order the rock wool for its customers, insulation applicators, and the Company would ship the rock wool direct to the customers, but send the bill to the Corporation which, in turn, billed its customers. By agreement the bill was marked up 10% and the Corporation charged its customers \$35 per ton for the merchandise which the Company sold it for \$32 per ton. The Company's suit was begun to collect a bill for one of these shipments. The Corporation^{had} refused to pay

THE THERMAL-ITM INSULATION COMPANY,
a corporation,

Plaintiff - Appellant,

AMERICAN INSULATION CORPORATION,

Defendant - Appellee.

MR. JUSTICE KILPATRICK delivered the opinion of the court.

This is an action for the sale price of insulating

material, with a counter claim for damages and interest alleged

verbal contract. Plaintiff's claim was not disputed and a judgment

for \$384 was entered in its favor. The counter claim was resisted

by counter defendant, plaintiff, and it appears from a judgment on

the counter claim of \$250. We shall refer to plaintiff and counter

defendant as the Company and to the defendant and counter plaintiff

as the Corporation.

The Company contends there was no contract and that, even

if there were, it would have come within the prohibition of section

1 of the Statute of Frauds (Comp. St. Ill. Rev. Stat.) and section 4

of the Uniform Sales Act (Comp. St. Ill. Rev. Stat.) and that

accordingly, the Corporation should not recover.

The Corporation was a jobber or broker through which the

Company sold rock wool for insulation. The Corporation would order

the rock wool for its customers, insulation applicators, and the

Company would ship the rock wool direct to the customers, but send

the bill to the Corporation which, in turn, billed its customers.

By agreement the bill was marked up 10¢ and the Corporation charged

its customers \$35 per ton for the merchandise which the Company

sold it for \$38 per ton. The Company's suit was begun to collect

a bill for one of these shipments. The Corporation refused to pay

until it was given an accounting for commissions it claimed under an oral agreement with the Company. This alleged agreement is the nub of the appeal. The judgment implies that the trial court found such an agreement was made.

Weiss, president of the Corporation, testified that he made the contract with Johnston, who said he was president of the Company, early in 1941; that under the contract the Corporation was to solicit customers for the Company, and receive a commission of 10% of the sales; that whatever customers were to be obtained were to be billed through the Corporation in the manner referred to, but that should any be billed direct, the Company would pay the Corporation its 10%; that the Company would not solicit the Corporation's customers direct; and that the Corporation would guarantee the credit of its customers. Weiss further testified that the Company solicited a customer direct in March 1941, but later paid the commission, saying the event was an "oversight" and that subsequently Weiss checked and found other instances of direct solicitation and sales without payment of commission to the Corporation. Johnston testified that he was vice president of the Company and had negotiated with Weiss but did not sign an agreement and that the Company did not "sign" an agreement. It appears that Weiss drew a written agreement which was not signed. The dispute, however, concerns an oral agreement, and Johnston does not deny making an oral agreement. He admits agreeing with Weiss as a "matter of courtesy to a distributor in good standing", that the Company would not interfere with the Corporation's customers. Johnston and Keegan, the latter president of the Company, testified the only agreement was to sell through the Corporation at jobbers' prices. Keegan denies any agreement to pay commissions, saying that he told Weiss as long as the Corporation was in good standing, the Company would not bother its customers.

until it was given an accounting for commissions it claimed under an oral agreement with the Company. This alleged agreement is the nub of the appeal. The judgment implies that the trial court found such an agreement was made.

Weiss, president of the Corporation, testified that he made the contract with Johnston, who was president of the Company, early in 1941; that under the contract the Corporation was to solicit customers for the Company, and receive a commission of 10% of the sales; that whatever customers were to be obtained were to be billed through the Corporation in the manner referred to, but that should any be billed direct, the Company would pay the Corporation the 10%; that the Company would not solicit the Corporation's customers direct; and that the Corporation would guarantee the credit of its customers. Weiss further testified that the Company solicited a customer direct in March 1941, but later paid the commission, saying the event was an "oversight" and that subsequently Weiss checked and found other instances of direct solicitation and sales without payment of commission to the Corporation. Johnston testified that he was vice president of the Company and had negotiated with Weiss but did not sign an agreement and that the Company did not "sign" an agreement. It appears that Weiss drew a written agreement which was not signed. The dispute, however, concerns an oral agreement, and Johnston does not deny making an oral agreement. He admits agreeing with Weiss as a "matter of courtesy to a distributor in good standing", that the Company would not interfere with the Corporation's customers. Johnston and Keegan, the latter president of the Company, testified the only agreement was to sell through the Corporation at Johnston's prices. Keegan denied any agreement to pay commissions, saying that he told Weiss as long as the Corporation was in good standing, the Company would not bother its customers.

It was stipulated that the Company sold merchandise to customers, supplied by the Corporation directly, amounting to \$6,340.03 for which no commissions were paid. An official of one of these customers, American Insulation Corporation, a company of Rock Island, Illinois, testified that Johnston told him that if the customer used a fictitious name - Iowa Insulation Distributors - and a different address in Davenport, Iowa, the 10% commission due the Corporation could be avoided and the customer's price reduced that amount. Johnston admitted that he knew the officials of the Company involved were Weiss' customers, but that he did not suggest the use of a fictitious name. The customer, however, was billed not in its own name, but under the name of Iowa Insulation Distributors, and the bills, were paid in the name of the American Insulation and Roofing Company. Johnston denied that this arrangement was a device to circumvent the Corporation and says that he was informed that the Iowa Insulation Distributors was a bona fide firm under the management of the officials of the American Insulation Roofing Company and that the shipments were made to Davenport, Iowa, in order to avoid the Illinois Sales Tax. It appears from the evidence, however, that at least one shipment was made to the American Insulation Company at Rock Island, Illinois. The Company admits having paid commissions to the Corporation on the direct sale made "through an oversight", but the officers testified that this was done as a courtesy and "to save an argument". The trial court saw and heard these witnesses and was justified in finding that the oral contract alleged by the Corporation had been made.

The counter claim was not based upon a sale but upon an oral contract for commissions. Section 4 of the Uniform Sales Act does not, therefore, apply.

The Company contends that under the Corporation theory, the contract was not to be performed within a year and is, therefore,

unenforceable by virtue of Section 1 of the Statute of Frauds. It refers to the testimony of Weiss that there was no time limit "on the arrangement" and that it would be "forever" as far as any duty was concerned. The purpose of the Statute of Frauds is to prevent false swearing and perjury, but it cannot be invoked to perpetrate a wrong. The contract was not for any stated period beyond a year, but was indefinite as to terms. There was no stated number of customers the Corporation was to introduce. The contract was, by its nature, dependent upon the ability of Weiss and, since he could have died within a year of its making, for that reason it could have been performed within a year and, accordingly, the contract does not come within the Statute of Frauds. Osgood v. Skinner, 111 Ill. App. 606; Mead v. C. & N. W. Ry. Co., 189 Ill. App. 323; 49 Am. Juris. p. 414; Browne, Statute of Frauds, 4th Ed. Sec. 276. The Company argues that the parties here are Corporations and that the foregoing rule does not apply. Corporations may suffer the same fate as individuals. The contract appears to be one which either party might have terminated within a year and, for that reason, does not come within the Statute of Frauds. (Mead v. C. & N. W. Ry. Co.; Browne, Statute of Frauds, Sec. 276; Amer. Juris. p. 414; Everitt v. New York Engraving & Printing Co., 35 N. Y. Supp. 1097). In fact the evidence shows that the Company removed the Corporation as jobber in September 1941, which was within a year of the making of the oral contract.

For the reasons given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND LUPE, J. CONCUR.

unenforceable by virtue of section 1 of the Statute of Frauds. It refers to the testimony of the fact that there was no time limit on the arrangement, and that it would be "forever" as it is very long was concerned. The purpose of the Statute of Frauds is to prevent false swearing and perjury, but it cannot be invoked to prevent a wrong. The contract was not for the stated period, but it was intended to be to last. It was intended to be to last, and it was intended to be to last. The corporation was to last. The contract was to last. The nature, dependent upon the ability of the fact, since he could have died within a year of the time, and it would be could have been performed within a year and, accordingly, the contract does not come within the Statute of Frauds. Quinn v. Quinn, 111 Ill. App. 602; Ward v. C. & F. Co., 188 Ill. App. 541; 42 Ill. 2d 414; Brown, Statute of Frauds, 4th ed. 125. The Company argues that the parties here are corporations and that the foregoing rule does not apply. Corporations are not within the same class as individuals. The contract appears to be one which either party might have terminated within a year and, for that reason, does not come within the Statute of Frauds. (Quinn v. Quinn, 111 Ill. App. 602; Ward v. C. & F. Co., 188 Ill. App. 541; 42 Ill. 2d 414; Brown, Statute of Frauds, 4th ed. 125; Quinn v. Quinn, 111 Ill. App. 602; Ward v. C. & F. Co., 188 Ill. App. 541; 42 Ill. 2d 414; Brown, Statute of Frauds, 4th ed. 125). In fact the evidence shows that the Company removed the Corporation as partner in September 1941, which was within a year of the making of the oral contract. For the reasons given the judgment of the Municipal Court

is affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J. AND LEE, J. CONCUR.

42958

MARY LATHAM,
Plaintiff - Appellee,
v.
HOWARD D. SALISBURY,
Defendant - Appellant,

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

32 1A 253

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order denying his motion to vacate an ex parte judgment in a suit brought by his mother-in-law for necessities furnished his wife and child.

Plaintiff sued January 23, 1931, claiming that her daughter and grandson, defendant's wife and son, during 1929 and 1930 lived separate and apart from defendant because of his cruelty; that defendant's wife was without means to support herself and son; that defendant neglected to provide for them and that plaintiff supplied necessities for them to the extent of \$2,000, in consideration of which defendant promised to repay that sum; and that he, although requested, has refused to pay. Defendant through Litsinger, Healy & Reid, Attorneys, filed a demurrer February 4, 1931 and, on October 26, 1934, filed a plea of nonassumpsit. June 17, 1936 the ex parte judgment was entered, against defendant in the sum of \$1,842.00. July 17, 1936 defendant filed a sworn petition asking that the judgment be vacated and that Leon Isaacson, Attorney, be given leave to appear as defendant's attorney in lieu of those first named. The petition recited that defendant had no attorney representing him when the judgment was entered, was not informed that the cause had been placed on a "special calendar" and set for trial, and first learned of the judgment on July 16, 1937. The "motion to vacate" was entered and continued until further notice.

MARY LATHAM,

Plaintiff - Appellee,

v.

HOWARD D. LATHAM,

Defendant - Appellant.

APPEAL FROM

COURT OF

COOK COUNTY,

37 I.A. 378

MR. JUSTICE WILLIAM H. HARRIS, JR., delivered the opinion.

Defendant appeals from an order denying his motion to vacate an ex parte judgment in a suit brought by his mother-in-law.

For necessities furnished his wife and child.

Plaintiff died January 22, 1931, claiming that her

daughter and grandson, defendant's wife and son, during 1930 and

1931 lived separately and apart from defendant because of his cruelty;

that defendant's wife was without means to support herself and son;

that defendant neglected to provide for them and that plaintiff

applied necessities for them to the extent of \$7,000, in consideration

of which defendant promised to repay said sum; and that he,

although requested, has refused to pay. Defendant through Lathams,

Healy & Reid, Attorneys, filed a demurrer February 4, 1931 and,

on October 26, 1934, filed a plea of nonassumpsit. June 17, 1935 the

ex parte judgment was entered, against defendant in the sum of

\$1,842.00. July 17, 1935 defendant filed a sworn petition asking

that the judgment be vacated and that Leon Isaacson, Attorney, be

given leave to appear as defendant's attorney in lieu of those

first named. The petition recited that defendant had no attorney

representing him when the judgment was entered, was not informed

that the cause had been placed on a "special calendar" and set

for trial, and first learned of the judgment on July 16, 1935. The

"motion to vacate" was entered and continued until further notice.

No further proceedings were had until January 14, 1943, when defendant through Sonneschein & Mitchell, Attorneys, upon notice, presented a petition reciting the history of the proceedings and stated that defendant had "at all times" been of the impression that the judgment had been vacated and the cause placed on a calendar for trial; that defendant had a meritorious defense in said matter and "that he is not obligated in any way, manner or form to said plaintiff." Defendant asked leave to file an affidavit of merits and that the cause be set for trial. The motion was entered and continued to April 14th. On that date an affidavit of defense was filed in the clerk's office. The record does not show any ruling upon "the motion to vacate" or for leave to file the affidavit, neither does the record before us show the filing of a withdrawal by Litsinger, Healy & Reid, or the appearance and withdrawal of Attorney Isaacson. April 29, 1943, plaintiff served notice that she would at the hearing of defendant's petition to vacate and for leave to defend, ask the court to deny the prayers of the petitions filed July 17, 1936 and January 14, 1943, and also move to strike the "Affidavit of Defense" and that in support of her motion she would present affidavits of her attorney, her grandson and herself. April 30, 1943, Sonneschein and Mitchell were given leave to withdraw as defendant's attorneys. May 19, 1943 defendant moved to strike the affidavits which had been filed in the clerk's office with plaintiff's notice above referred to. This motion was made by Attorney Weiss who was given leave to enter his appearance as defendant's attorney and the motion was continued. June 2, 1943 Attorney Weiss was given leave to withdraw his appearance. June 16, 1943 Attorney Harold Blake filed a "substitution" as attorney for defendant. The record does not show that he was given leave to do so.

June 18, 1943 an order was entered denying "the motion to vacate" entered June 17, 1936, as being "without merit". The order found, though the pertinent record does not otherwise show, that when the ex parte judgment was entered Litsinger, Healy & Reid had withdrawn as defendant's attorney and his appearance pro se was on file. The order recited the history of defendant's attorneys, their appearances, withdrawal and substitutions; referred to the many months the motion had been pending and the numerous continuances granted; and denied the "motion to vacate" and refused Attorney Blake leave to appear. The record does not show that defendant had obtained leave to file the "Affidavit of Defense" and when it was filed he had not yet brought his petition, seeking to vacate the judgment, to a hearing. The trial court properly disregarded the Affidavit.

The only pleadings properly before the court when the final order was entered were defendant's petitions of July 17, 1936 and January 14, 1943. Looking back from the findings in the final order to the statement in the first petition, there was plainly no excuse shown why defendant was not present for the trial. If he purported to represent himself, he assumed the responsibility of watching calendars and trial dates. Furthermore, there is no attempt to show that defendant had a meritorious defense to plaintiff's action. The second petition stated that defendant has a "meritorious defense" and is "not obligated" to plaintiff. Those conclusions were insufficient. If defendant had a defense he should have set up the facts which constituted it.

The petitions were addressed to the discretion of the trial court and, from what we have said, it should be clear that there was no abuse of that discretion. The order is hereby affirmed.

ORDER AFFIRMED.

BURKE, P.J. AND LUPE, J. CONCUR.

June 18, 1943 an order was entered denying "the motion to vacate" entered June 17, 1938, as being "without merit". The order found, though the pertinent record does not show that when the ex parte judgment was entered the defendant had withdrawn as defendant's attorney and his appearance was on file. The order recited the history of the proceedings, their appearance, withdrawal and substitution; it found that many months after motion had been denied and the defendant was granted; and denied the "motion to vacate" and refused to leave to appear. The record does not show the defendant had obtained leave to file the affidavit or when it was filed he had not yet brought his motion, seeking to vacate the judgment, to a hearing. The trial court properly considered the Affidavit.

The only findings properly before the court when the final order was entered were defendant's petition of July 17, 1938 and January 14, 1943. Looking back over the findings in the final order to the statement in the first petition, where was stated no answer shown why defendant was not present for the trial. It was purported to represent himself, he assumed the responsibility of watching calendars and trial dates. Furthermore, there is no attempt to show that defendant had a meticulous defense to plaintiff's motion. The second petition stated that defendant has a "meticulous defense" and is "not obligated" to plaintiff. These conclusions were insufficient. If defendant had a defense he should have set up the facts which constituted it.

The petitions were addressed to the discretion of the trial court and, from what we have said, it should be clear that there was no abuse of that discretion. The order is hereby affirmed.

ORDER AFFIRMED.

BURKE, P.J. AND LUBE, J. CONCUR.

42998

RE: THE ESTATE OF ANDERSON PALMER,
DECEASED,

ROXIE MILLS,

Appellant,

v.

JOHN T. DEMPSEY, Administrator of
Estate of Anderson Palmer, Deceased,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

326 L.A. 254

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action by Roxie Mills to recover money held by Respondent, Administrator, as assets of decedent's estate on the ground that it is hers by virtue of a gift causa mortis. She appeals from an order entered in a trial de novo, following her appeal from the Probate Court, where her prayer was denied and petition dismissed.

May 1, 1940, sickness forced Anderson Palmer to his bed in his room at 4135 Langley Avenue, Chicago. May 18th he was removed to the Hines Memorial Hospital at Hines, Illinois, where he remained until he died intestate July 13, 1940. Several months thereafter the defendant Public Administrator took over administration of Palmer's Estate and plaintiff delivered to him a pass book covering Palmer's Savings Deposit of \$1,292.86 at the Drexel State Bank and three withdrawal slips two for \$600 each and one in blank. The slips had been filled in by plaintiff and signed by Palmer and were designed to withdraw the funds on deposit. The question is whether Palmer, before his death, made a gift of the funds on deposit to plaintiff.

Plaintiff had the burden of proving the gift by clear and convincing evidence. Barnum v. Reed, 136 Ill. 388; Rothwell v. Taylor, 303 Ill. 226; Keshner v. Keshner, 376 Ill. 354; Estate of Esther Williams v. Tuch, 313 Ill. App. 230. An essential

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222 4500

2. The first part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as $t \rightarrow \infty$. It is shown that the solutions of the system (1) are bounded and tend to zero as $t \rightarrow \infty$ if the matrix A is stable. The second part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as $t \rightarrow \infty$ if the matrix A is not stable. It is shown that the solutions of the system (1) are bounded and tend to zero as $t \rightarrow \infty$ if the matrix A is not stable and the matrix B is positive definite.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

4

1. The first step is to identify the problem or goal. This involves understanding the current situation, identifying the key issues, and setting clear objectives. It is important to involve all relevant stakeholders in this process to ensure that the problem is well-defined and that the goals are realistic and achievable.

Question is whether a river, before its mouth, is navigable.

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element of the proof was that Palmer delivered the pass book and withdrawal slips to plaintiff with the intention to pass title to the funds on deposit, not irrevocably, as in the case of a gift inter vivos, but revocable in the event Palmer should recover from his illness. Barnum v. Reed. The evidence must show that Palmer when he gave plaintiff the symbols of his money intended that it should be hers absolutely unless he recovered. Simpson v. Heberlein, 259 Ill. App. 579.

The testimony is uncontroverted that May 18, 1940, Palmer sent for plaintiff, saying he had some business for her; that she went to his room and he gave her the pass book and withdrawal slips; that he made the delivery in the presence of Mrs. Casey and said that he wanted the latter to see that he was "giving this to 'Little Fella'"; that he told plaintiff to hold them; and that she understood she was to use the money according to directions he gave her. Mrs. Casey testified that Palmer said he was "leaving something behind" and "I leave it all stand with 'Little Fella'" and that he "was turning everything over to her give to her; said he was leaving everything all right."; that he had a brother whom he could not contact and who would not answer his letters; and that he was leaving everything to plaintiff because there was no one else to leave it to. Palmer's landlady testified that while he was in the hospital he wrote her that he was giving up the room and directing that his personal effects be given to plaintiff, and that she followed the directions. She did not present the note, because she said she had thrown it away.

In her sworn petition, plaintiff, among other things, stated that Palmer had given her the moneys with instructions that they belonged to her to use and distribute as he directed, and that he directed her to give certain portions of the money to his

element of the proof was that Palmer delivered the pass book and withdrawal slips to plaintiff with the intention to pass title to the funds on deposit, not irrevocably, as in the case of a gift inter vivos, but revocable in the event Palmer should recover from his illness. Barnes v. Reed. The evidence must show that Palmer when he gave plaintiff the symbols of his money intended that it should be bene absolutely unless he recovered. Limbach v. Heberlein, 259 Ill. App. 579.

The testimony is uncontroverted that May 18, 1940, Palmer sent for plaintiff, saying he had some business for her; that she went to his room and he gave her the pass book and withdrawal slips; that he made the delivery in the presence of Mrs. Casey and said that he wanted the latter to see that he was giving this to "Little Fella"; that he told plaintiff to hold them; and that she understood she was to use the money according to directions he gave her. Mrs. Casey testified that Palmer said he was "leaving something behind" and "I leave it all stand with 'Little Fella'" and that he "was turning everything over to her give to her; said he was leaving everything all right"; that he had a brother whom he could not contact and who would not answer his letters; and that he was leaving everything to plaintiff because there was no one else to leave it to. Palmer's landlady testified that while he was in the hospital he wrote her that he was giving up the room and directing that his personal effects be given to plaintiff, and that she followed the directions. She did not present the note, because she said she had thrown it away.

In her sworn petition, plaintiff, among other things, stated that Palmer had given her the money with instructions that they belonged to her to use and distribute as he directed, and that he directed her to give certain portions of the money to his

brother in Mississippi. Defendant introduced in evidence a letter written by plaintiff to Palmer's brother in which she advised the brother of Palmer's death and said that "all he told me to let you have is yours." She asked whether the Hospital had sent the brother Palmer's clothing and said that she could not send anything until she had an order of court; that she was trying to keep the State from taking everything and that, "All I have is yours, but I can't move it on account of your negligence." She advised him to have his lawyer read her letter and stated that she had hired a lawyer to save Palmer's earnings "for you and myself too." Defendant also introduced a post card from plaintiff to Palmer's brother, advising him that he would be dealt with "justly".

Defendant points to plaintiff's failure to exercise any act of ownership over the moneys from the date of Palmer's death, July 13, 1940 until April 17, 1943, when she left the pass book and slips in court. While that fact is not controlling, it is entitled to weight against plaintiff's claim. In re Estate of Antkowski, 286 Ill. App. 184. The record does not disclose clear and convincing proof of the requisite intent. In evaluating the evidence, in this case, observation of the witnesses was very important. The trial court had the benefit of observing the witnesses and we cannot say that it should have held that plaintiff had established a gift causa mortis. It can be said with greater force that a gift inter vivos was not established.

For the reasons given the order of the Circuit Court is affirmed.

ORDER AFFIRMED.

BURKE, P.J. AND LUPE, J. CONCUR.

brother in fact stated. Statement introduced in evidence a letter

written by defendant to Plaintiff's brother in which he advised the

brother of Plaintiff's death and that if he could do so let

you know it. The letter further stated that the brother had been the

brother Plaintiff's brother and that the wife had been anything

until she had an order of court; that she had been to see the

State from having everything in order, that I had a letter, but

I can't move it on account of your death, and I had him to

have his lawyer write her letter and let her know that I had

known to have Plaintiff's brother, and I had a letter from

also introduced a letter from Plaintiff to Plaintiff's brother,

advising him that he was in the hospital.

Defendant's letter to Plaintiff's brother is introduced in

not of interest over the record from the date of Plaintiff's death,

July 15, 1940 until April 19, 1941, and also the record book and

also in court. Also that fact is not established, it is established

to require Plaintiff's brother to be in the hospital.

230 Ill. App. 194. The record does not show Plaintiff's brother and Plaintiff

proof of the requisite intent. In evaluating the evidence, in this

case, observation of the witnesses was very important. The trial

court had the benefit of observing the witnesses and we cannot say

that it should have held that Plaintiff had established a gift

caused mortis. It can be said with greater force that a gift in fact

was not established.

For the reasons given the court of the Circuit Court is

affirmed.

ORDER AFFIRMED.

BURKE, P. J. AND LANE, J. CONCUR.

43109

SAM LEVY,

Appellant,

v.

CHARLES D. BERNARD, doing business as
BERNARD BOX COMPANY,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

326 L.A. 254²

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

On July 1, 1943, plaintiff confessed judgment for rent under a written lease with defendants for \$2,510.62 and costs for half of the month of January and the months of February, March, April, May, June and July, 1943 at \$375 per month less credits and including attorney's fees. August 2, 1943 plaintiff by eliminating rentals for June and July and modifying the attorney's fees reduced the judgment to \$1,723.12 and costs. On that day the court under agreement of the parties opened the judgment and permitted the defendant to make a defense. February 9, 1944 the judgment of August 2, 1943 was reduced to \$678.75. Plaintiff appeals.

The written lease between the parties was made June 11, 1941, to expire December 31, 1948. The term rental was \$35,200.00, payable \$250 in July 1941 and the balance in 26 installments of \$375 and 63 installments of \$400, payable monthly. In February 1943, defendant, distressed financially, met with plaintiff's agent Siegel and entered into a parol agreement, modifying the rental terms of the lease. Thereafter, on March 5, 1943, defendant gave Siegel one check for \$50 and one for \$25 and on May 1st another check for \$50. Prior to May 15, he sent Siegel a check for \$150, postdated May 15 and endorsed "In full settlement of all claims and accounts * * *." The postdated check was returned to defendant in a letter by Siegel which indicated that the reason for returning it was the endorsement.

BAM LEVY

Appellant

v.

CHARLES J. BARNARD, doing business as
BARNARD BOX COMPANY,

Appellee.

384

NO. 10,000,000, THE

On July 1, 1943, Plaintiff purchased from defendant

under a written lease with term of 12 months, commencing

for half of the month of January and the month of February, March,

April, May, June and July, 1943, and month of August, 1943.

and including attorney's fees, to wit: \$1,000.00, Plaintiff's

instating rentals for June and July and including the attorney's

fees reduced the judgment to \$1,750.00 and costs. On that day the

count under agreement of the parties entered and judgment was

permitted the defendant to take a defense. February 9, 1944, the

judgment of August 2, 1943 was reduced to \$2,750.00. Plaintiff appealed.

The written lease between the parties was made June 11,

1941, to expire December 11, 1943. The term rental was \$5,800.00.

payable \$200 in July 1941 and the balance in 12 installments of

\$375 and 60 installments of \$400, payable monthly. In February 1943,

defendant, after stated financially, met with Plaintiff's agent Sigel

and entered into a verbal agreement, modifying the rental terms of

the lease. Thereafter, on March 5, 1943, defendant gave Sigel one

check for \$50 and one for \$25 and on May 1st another check for \$50.

Prior to May 15, he sent Sigel a check for \$100, postdated May 15

and endorsed "In full settlement of all claims and accounts * * *"

The postdated check was returned to defendant in a letter by

Sigel which indicated that the reason for returning it was the

endorsement.

The question is whether the three checks accepted and cashed by plaintiff totaling \$125 were for March, one half of April and for May rent under the parol agreement as defendant contends; or as payments on account of the rent due for half of January and all of February on the basis of \$375 per month, as plaintiff contends.

A parol agreement to reduce the rental terms in a written lease will not be disturbed if it has been executed by the parties. Snow v. Griesheimer, 220 Ill. 106; Levy v. Greenberg, 261 Ill. App. 541; Camp v. Munger's Laundry, 303 Ill. App. 656; McCarthy v. Katin, et al., 318 Ill. App. 639. Moreover, the reductions are separate and distinct items each month and, when paid and accepted, constitute an executed, complete and irrevocable gift and the amount of the reduction cannot be recovered. Levy v. Greenberg, 261 Ill. App. 541. Accordingly, if the evidence supports the contention of the defendant, plaintiff was entitled to recover only the amount due under the written lease for half of January and all of February and \$25 for the month of April. On the other hand, if the evidence supports the plaintiff's contention, the parol agreement cannot stand since it is executory and plaintiff is entitled to recover according to the terms of the written lease for the months of March, April and May, as well as for half of January and the month of February.

The trial court in sustaining defendant's position determined that the parties intended that the three checks should be applied to March, April and May rent. Siegel testified that the parol agreement of February 12th required that defendant pay the rent due under the written lease for January and February within two days and that only in that event would the rent for March, April and May, subject to plaintiff's approval, be reduced to \$50. The evidence showed, however, that defendant did not make the January and February payments within two days and, nevertheless,

The question is whether the three checks accepted and cashed by plaintiff totaling \$55 were for March, one half of \$110 and for May rent under the parol agreement as defendant contends; or as payments on account of the rent due for January and all of February on the basis of \$55 per month, as plaintiff contends.

A parol agreement to refund the rental terms in a written lease will not be enforced if it has been accepted by the parties. 2nd v. Kirschner, 200 Ill. 111; Levy v. Greenberg, 201 Ill. App. 541; Levy v. Greenberg, 202 Ill. App. 552; McCarthy v. Kellin, 215 Ill. App. 502. However, the reductions are separate and distinct items each month and, when paid and accepted, constitute an executed, complete and irrevocable gift and the amount of the reduction cannot be recovered. Levy v. Greenberg, 201 Ill. App. 541. Later, indeed, if the evidence supports the contention of the defendant, plaintiff was entitled to recover only the amount due under the written lease for half of January and all of February and \$5 for the month of April. On the other hand, if the evidence supports the plaintiff's contention, the parol agreement cannot stand since it is executory and plaintiff is entitled to recover according to the terms of the written lease for the months of March, April and May, as well as for half of January and the month of February.

The trial court in sustaining defendant's position determined that the parties intended that the three checks should be applied to March, April and May rent. It was testified that the parol agreement of February 18th recited that defendant pay the rent due under the written lease for January and February within two days and that only in that event would the rent for March, April and May, subject to plaintiff's approval, be reduced to \$50. The evidence showed, however, that defendant did not make the January and February payments within two days and, nevertheless,

Siegel on March 5 called upon defendant and requested "** * * some rent, even \$10 or \$5 * * *" and accepted the two checks totaling \$75 and later, May 1, accepted a further check for \$50. It was the view of the trial court that the conduct of Siegel was inconsistent with the theory that the reduced rental agreement was dependent upon the payment of January and February rentals within two days. Siegel said that he applied the checks upon the January and February rent, but did not discuss the application with defendant. Plaintiff testified that he did not know on what months these checks were to be applied. Defendant testified that when he gave the checks to Siegel in March, he explained the money was for March rent and part of the April rent, and that he had no conversation about the application of the check dated May 1st. He also testified that he had no further conversation about the application of the checks, and that he did not "owe plaintiff for any rent for March or May, but owed him \$25 for April". He denied any agreement to pay the January and February rent within two days of February 12. On final examination by the court, defendant testified that he had no conversation with Siegel about the application of the checks given March 5th.

The plaintiff contends that since defendant did not direct Siegel to apply the three checks for the then current rents, that plaintiff had the right to make the application as he pleased. Defendant argues that no application was actually made to the January and February rents and that Siegel's testimony regarding the application indicates a mere mental application, especially in view of the fact that no books or records were kept by plaintiff of the rentals. The question is what the intention of the parties was at the time the checks were received by Siegel. The court found that the intention was that the checks should be applied to March, April and May rents. Both parties rely upon Liese v. Hentze, 326 Ill. 633,

Seigel on March 5 called upon defendant and returned to his home
 rent, even -10 or 15 ** and accepted a two month rental
 78 and later, May 1, accepted a further rental for 1932, at the
 the view of the fact that the rental was not paid for the previous
 alient with the fact that the rental was not paid for the previous
 dependent upon the payment of a rental and that the rental was not
 two days. Seigel said that he would not accept the rental for
 and February rent, but did not discuss the rental for the previous
 Plaintiff testified that he did not know where the rental was
 checks are to be applied. He said that he did not know where the
 the checks to be applied in 1932, but that he did not know where the
 rent was paid of the rental, and that he did not know where the
 about the application of the rental for 1932. He said that he
 that he had no further conversation with defendant about the rental of the
 checks, and that he did not know where the rental was paid for 1932.
 or May, but owed him 15 for 1932. He denied any agreement to
 pay the January and February rent within the year of February 1932.
 On final examination by the court, Seigel testified that he did
 no conversation with Seigel about the rental of the checks
 given March 5th.

The Plaintiff contends that the rental for 1932 was not paid
 Seigel to apply the three checks for the three month rental, that
 Plaintiff had the right to make the application as he pleased.
 Defendant argues that no application was made for the January
 and February rents and that Seigel's testimony as to the applica-
 tion indicates a mere mental application, especially in view of the
 fact that no books or records were kept by Plaintiff of the rental.
 The question is what the intention of the parties was at the time
 the checks were received by Seigel. The court found that the
 intention was that the checks should be applied to March, April and
 May rents. Both parties rely upon Isaac v. Hantse, 226 Ill. 632,

for the proper rule upon the question of application of payments by a debtor. The court there said that the debtor may control the application and, if he does not do so, the creditor may apply as he chooses. It states further, however, that in the absence of an exercise of the right by either party, the court may make such application as is just and equitable. The plaintiff argues that the checks indicate the defendant's intention to make payments on the January and February rent; that if defendant was distressed financially, he would not be paying \$25 in advance March 5 on the April rent, nor would he on May 1st pay but \$50 when he owed not only \$50 for May, but the balance for April and that moreover, the post-dated check cannot be explained under defendant's theory. According to Siegel, defendant on March 5th spoke of an order from Washington and seemed quite anxious for a lease. This may explain why he paid \$75 instead of \$50 at that time; or it may be that all of these considerations presented by plaintiff may be answered by pointing to defendant's financial distress in which he made payments as he found money available. Defendant testified that "I had to hurt myself" to give the \$150 check, but that Siegel wanted the money badly and I wanted to stay there a little bit longer. He denied that the \$150 check was for application on the January and February rent, saying he sent it for another reason. He did not explain the reason, nor did Siegel rebut the testimony that he wanted money badly in May.

Under these circumstances and in view of indefinite testimony on the vital issue, it was important for the trial court to observe the witnesses closely and to determine the meaning of the defendant's testimony. He was in a better position than we are to gather the meaning of the witnesses from all their testimony. Under the circumstances we believe that we should not disturb the judgment and it is hereby affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND LUPE, J. CONCUR.

For the proper rule upon the question of application of payment by a debtor. The court there said that the debtor may control the application and, if he does not do so, the creditor may apply as he chooses. It states further, however, that in the absence of an exercise of the right of election by the debtor, the creditor may apply such application as is just and equitable. This is the rule.

That the check is not the defendant's intention to make payment of the January and February rent; that if defendant was dissatisfied financially, he would not be taking the 150 check from the April rent, nor would he in May pay out 50 when he owed not only 150 for May, but the balance for April and that moreover, the post-dated check cannot be cashed until defendant's check. According to the defendant's testimony, defendant did not intend from Washington and came to the city for a time. This may explain why he paid 75 instead of 50 at that time; it may be that all of these considerations presented by the defendant are answered by pointing to defendant's financial distress in which he was engaged as he found money available. Defendant testified that "I had to hurt myself" to give the 150 check, but that I did not want the money badly and I wanted to stay there a little bit longer. He denied that the 150 check was for application on the January and February rent, saying he sent it for another reason. He did not explain the reason, nor did he tell about the testimony that he wanted money badly in May.

Under these circumstances and in view of defendant's testimony on the vital issue, it was important for the trial court to observe the witnesses closely and to determine the meaning of the defendant's testimony. He was in a better position than we are to gather the meaning of the witness from all their testimony. Under the circumstances we believe that we should not disturb the judgment and it is hereby affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J. AND LUPK, J. CONCUR.

42536

JOHN F. SNIEGOWSKI, Adm'r. of the
Estate of Raymond J. Sniegowski,
Deceased,

Appellant,

v.

EDWARD L. REECE and GEORGE W.
KLEIN,

Appellees.

APPEAL FROM

CIRCUIT COURT

COCK COUNTY.

320 L.A. 255

MR. JUSTICE LUPE DELIVERED THE OPINION OF THE COURT.

This action was instituted by the administrator of the estate of Raymond J. Sniegowski, deceased, to recover damages arising out of the alleged wrongful death of plaintiff's intestate, occurring as the result of a collision between an automobile operated by the decedent and a truck owned by defendant George W. Klein and driven by defendant Edward L. Reece. At the conclusion of the evidence offered on behalf of plaintiff, the trial court sustained the motion to instruct the jury to find the defendants not guilty. The jury returned a verdict as directed, and judgment was entered thereon. Plaintiff appealed.

The collision occurred at about half past two o'clock in the morning of Saturday, March 22, 1941, on Main street at a point east of Lemont and west of the intersection of Main street and Illinois street which comes into Main street from the southwest on a slant and merges into Main street as that highway continues east. Main street is an 18-foot concrete highway which passes through Lemont and runs east and west with a slight curve toward the south. Both highways are concrete and after their merger into one highway are known as Illinois Route 4A. As Illinois street approaches Main street from the southwest it slopes downward slightly to meet the grade of Main street. The latter highway slopes upward gradually toward the intersection. This causes a hump in the merging highways which continues for about 40 feet east of the intersection. The

JOHN F. SHILOH, JR., et al.,
Plaintiffs,
vs.
EDWARD J. REYNOLDS, et al.,
Defendants.

Case No. 10-10000-1
Filed: 10-10-10
Judge: [illegible]

This action was instituted by the administrator of the

estate of Edward J. Reynolds, deceased, to recover damages arising out of the alleged wrongful death of plaintiff's intestate,

occurring as the result of a collision between an automobile operated by the defendant and a truck owned by defendant George A. Klein and driven by defendant John F. Shilo, Jr. The collision

of the evidence offered in behalf of plaintiff, the trial court sustained the motion to instruct the jury to find the defendants not guilty. The jury returned a verdict in favor of the defendant and judgment was entered thereon. Plaintiff appeals.

The collision occurred at about half past two o'clock in the morning of Saturday, March 22, 1941, on Main Street at a point

east of Belmont and west of the intersection of Main Street and Illinois Street which comes into Main Street from the southwest on a slant and merges into Main Street as that highway continues east.

Main Street is an 18-foot concrete highway which passes through Belmont and runs east and west with a slight curve toward the south. Both highways are concrete and after their merger into one highway

are known as Illinois Route 44. As Illinois Street approaches Main Street from the southwest it slopes downward slightly to meet the grade of Main Street. The latter highway slopes upward gradually toward the intersection. This causes a hump in the merging highways which continues for about 40 feet east of the intersection. The

merged highways slope downward from the intersection. Throughout this convergence, the north side of Main street remains approximately level but the south edge of Illinois street is about 16 inches lower than the north edge of Illinois street and is about 14 inches lower than the north edge of Main street as the two highways converge. West of the intersection of Illinois and Main streets is a private gravel road running approximately north and south and crossing Main street. The decedent lived about four blocks south of Main street. Friday evening and early Saturday morning he had been bowling in Lundeen's bowling alleys in Lemont and four blocks west of the scene of the accident; there was a tavern attached to the alleys. He left the bowling alleys at about two o'clock Saturday morning, driving a 1939 Chevrolet automobile. It was a fair and clear night with good visibility. The deceased was next seen after the accident, lying on the front seat of his automobile, which was then standing north of Main street about 200 feet west of the above intersection, headed west toward Lemont; decedent was unconscious and badly injured; he died shortly thereafter.

There were no eye-witnesses to the accident. There was, therefore, no direct evidence as to the directions in which the truck and the automobile were being driven prior to the collision. Plaintiff's evidence, however, established the following facts: that the truck, which was admittedly owned by the defendant Klein and driven by defendant Reece, was a gasoline truck or tractor, of trailer type, with dual wheels; that after the accident the truck was found demolished and in flames, lying across Main street about 35 feet west of the intersection of Main and Illinois streets; that its wheels were in the air; that it was headed southeast, lying at a 40-degree angle across Main street, except for two or three feet along its south side;

merged highways slope downward from the intersection. Throughout this convergence, the north side of Main street remains approximately

level but the south edge of Illinois street is about 18 inches lower than the north edge of Illinois street and is about 18 inches lower than the north edge of Main street as the two highways converge.

West of the intersection of Illinois and Main streets is a private gravel road running approximately north and south and crossing Main street. The decedent lived about four blocks south of Main street.

Friday evening and early Saturday morning he had been bowling in

Lundeen's bowling alley in Mount and four blocks west of the scene of the accident; there was a sign attached to the alley. He left the bowling alley at about two o'clock Saturday morning,

driving a 1938 Chevrolet automobile. It was a fair and clear night with good visibility. The decedent was next seen after the accident, lying on the front seat of his automobile, which was then standing north of Main street about 200 feet west of the above intersection, headed west toward Mount; decedent was unconscious and badly injured; he died shortly thereafter.

There were no eye-witnesses to the accident. There was, therefore, no direct evidence as to the direction in which the truck and the automobile were being driven prior to the collision. Plaintiff's evidence, however, established the following facts: that the truck,

which was admittedly owned by the defendant Klein and driven by defendant Reese, was a gasoline truck or tractor, of trailer type, with dual wheels; that after the accident the truck was found demolished and in flames, lying across Main street about 25 feet west of the intersection of Main and Illinois streets; that its wheels were in the air; that it was headed southeast, lying at a 40-degree angle across Main street, except for two or three feet along its south side;

that the point of contact between the two vehicles was about 35 feet west of where the truck was lying or about 75 feet west of the above intersection; that there was one impact mark on the left front side of the truck, back of the cab, on the tank; that there were marks all over the truck; that the left rear wheels and axle of the tractor, which had been severed from the truck, were lying to the south of Main street across Illinois street, about 25 feet away.

John Pociask, the Chief of Police of Lemont, a witness of plaintiff's, testified on cross examination that he had testified before the Coroner's inquest that the truck had not hit the "sway" in the road before the collision occurred. Other witnesses testified on behalf of plaintiff that the decedent's Chevrolet car was found standing about 200 feet west of the truck, north of Main street, headed west toward Lemont; that its entire left side was demolished; that its running board, headlight glass, and windshield glass were found lying on the north side of the pavement of Main street about 30 feet west of the truck and about at the point of collision; that its left front wheel, which had been knocked off, was lying to the north of Main street, off the pavement, about 35 feet west of the truck; that the tire of the wheel was also lying on the north side of Main street. Witness Pociask, the only witness who was interrogated on the point, testified that he had found no tire marks made by the truck on the south half of Main street; later, on re-cross examination, he stated that he had found a marking, tire marks, on the pavement on the south half of Main street; and on cross-examination he admitted that at the Coroner's inquest he had testified that, "brake marks of the truck were on his side of the road"; "showed where he applied his brakes for 8 to 10 feet." He further testified that he later found that the tire marks on the north half of the roadway were not the tire marks of the truck. He further stated that, with the above exception, the only other mark he found on the pavement was a straight groove-like mark or scratch, about 18 to 24 inches long, running

that the point of contact between the two vehicles was about 35 feet west of where the truck was lying on about 75 feet west of the above intersection; that there was one impact mark on the left front side of the truck, back of the cab, on the tank; that there were marks all over the truck; that the left rear wheels and axle of the tractor, which had been severed from the truck, were lying to the south of Main street across Illinois street, about 25 feet away.

John Poolack, the Chief of Police of Lansing, a witness of plaintiff's, testified on cross examination that he had testified before the Governor's inquest that the truck had not hit the "away" in the road before the collision occurred. Other witnesses testified on behalf of plaintiff that the defendant's Chevrolet car was found standing about 100 feet west of the truck, north of Main street, headed west toward Lansing; that its entire left side was demolished; that its running board, headlight glass, and windshield glass were found lying on the north side of the pavement of Main street about 50 feet west of the truck and about at the point of collision; that its left front wheel, which had been knocked off, was lying to the north of Main street, off the pavement, about 55 feet west of the truck; that the tire of the wheel was also lying on the north side of Main street. Witness Poolack, the only witness who was interrogated on the point, testified that he had found no tire marks made by the truck on the south half of Main street; later, on re-cross examination, he stated that he had found a marking, tire marks, on the pavement on the south half of Main street; and on cross-examination he admitted that at the Governor's inquest he had testified that "brake marks of the truck were on his side of the road"; "showed where he applied his brakes for 8 to 10 feet." He further testified that he later found that the tire marks on the north half of the roadway were not the tire marks of the truck. He further stated that, with the above exception, the only other marks found on the pavement was a straight groove-like mark or scratch, about 18 to 24 inches long, running

straight east and west, lying about 18 to 20 inches north of the middle line of Main street, about 30 feet west of the truck, at about the point of collision, and that this mark was just enough to scrape the surface of the pavement and was just such a mark as one might expect if an axle had gone down and been carried along on the road, the concrete being broken at that point; and that this mark "wasn't made by the truck". Two witnesses testified on behalf of the plaintiff that the decedent enjoyed a reputation as a careful and prudent driver, and was a careful and prudent driver. The evidence shows that the speedometer needle on deceased's Chevrolet automobile, when examined after the accident, was frozen at 40 miles per hour.

Counsel for all parties agree, in substance, that a motion to direct a verdict for the defendant preserves for review only the question of law whether from the evidence in favor of plaintiff, standing alone, and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff. (Zirald v. Lynch Co., 365 Ill. 197, 199; Brophy v. Illinois Steel Co., 242 Ill. 55; City of Chicago v. Jarvis, 226 Ill. 614.) Conversely, "in the absence of evidence on which a jury could in the eye of the law reasonably find in favor of the party holding the affirmative of an issue, a motion to direct a verdict against the party so holding the affirmative should be allowed. (American National Bank v. Woolard, 342 Ill. 148, 155.)

It is also indisputable that the plaintiff, in sustaining the burden of proving the affirmative of an issue, is not restricted to proving it by direct evidence, but may prove it by circumstantial evidence. (Norkevich v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 1, 5; Devine v. Delano, 272 Ill. 166, 179-180.) Circumstantial evidence consists of proof of facts and circumstances from which the jury may infer (without direct evidence thereof) other connected facts which

usually and reasonably follow from the proven facts and circumstances; those connected facts are then said to have been proved by circumstantial evidence. But it cannot be said that the existence of fact a, may thus be inferred from the evidence when the existence of fact b, inconsistent with fact a, can be inferred with equal certainty. In the case of Condon v. Schoenfeld, 214 Ill. 226, at page 230, the court said:

"It cannot be said that the existence of a certain fact may reasonably be inferred from the evidence when the existence of another fact inconsistent with the first can be, from the same evidence, inferred with equal certainty."

The late Mr. Justice McSurely of our Appellate Court, in the case of Coffin v. Chicago City Ry. Co., 251 Ill. App. 169, at page 174, said:

"Whatever may be the law elsewhere, it is the rule in this state, established by a large number of decisions, that the existence of a certain fact cannot be reasonably inferred from the evidence when the existence of another fact, inconsistent with the first, can be inferred from the same evidence with equal certainty; a fact cannot be established by circumstantial evidence unless the circumstances are of such a nature and so related to each other that it is the only conclusion that can be drawn therefrom.

"It cannot be said that the existence of a certain fact may reasonably be inferred from the evidence when the existence of another fact inconsistent with the first can be, from the same evidence, inferred with equal certainty. The evidence must point to the existence of some particular fact, rather than to the existence of another fact inconsistent with the first, before it can be said that such evidence alone tends to prove the existence of the first." Chicago Union Traction Co. v. Hampe, 228 Ill. 346."

Very pertinent to the instant case is the language of Mr. Justice Dunn in Peterson & Co. v. Industrial Board, 281 Ill. 326, 330:

"Any of these suppositions is as consistent with the evidence as any other and all are mere conjecture. Liability cannot rest upon imagination, speculation or conjecture, upon a choice between two views equally compatible with the evidence, but must be based upon facts established by evidence fairly tending to prove them."

In the case of Neal v. Chicago, R. I. & P. Ry. Co., 129 Iowa, 5, cited with approval in Ohio Bldg. Vault Co. v. Indus. Board, 277 Ill. 96, the rule is thus quoted from Asbach v. Chicago, B. & Q. R. Co., 74 Iowa, 248, at 250:

"A theory cannot be said to be established by circumstantial evidence,

usually and reasonably follow from the proven facts and circumstances;

those connected facts are then said to have been proved by circum-

stantial evidence, but it cannot be said that the existence of such a

may thus be inferred from the evidence when the existence of fact is

inconsistent with fact a, can be inferred with equal certainty. In

the case of Goffin v. Goss, 212 Ill. 201, 202, 203, 204, 205, 206,

court said:

"It cannot be said that the existence of a fact can be reasonably
be inferred from the evidence when the existence of another fact
inconsistent with the first can be, from the same evidence, inferred
with equal certainty."

The late Mr. Justice Rogers of our Supreme Court, in the case

of Goffin v. Goss, 212 Ill. 201, 202, 203, 204, 205, 206, 207,

"However, it is the law of evidence, it is the law of logic,
established by a large number of authorities, that the existence
of a certain fact cannot be reasonably inferred from the evidence
when the existence of another fact, inconsistent with the first, can
be inferred from the same evidence with equal certainty; and that
be established by circumstantial evidence unless the circumstances
of such a nature and so related to each other that it is the only
conclusion that can be drawn therefrom."

"It cannot be said that the existence of a certain fact
may reasonably be inferred from the evidence when the existence of
another fact inconsistent with the first can be, from the same evidence,
inferred with equal certainty. The evidence must tend to the existence
of some particular fact, rather than to the existence of another fact
inconsistent with the first, before it can be said that such inference
alone tends to prove the existence of the first." Wheeler v. Union Trust Co.
90. v. Wheeler, 238 Ill. 116.

Very pertinent to the instant case is the language of Mr. Justice

Wain in Peterson & Co. v. Industrial Board, 221 Ill. 486, 490:

"Any of these suppositions is as consistent with the evidence as
any other and all are mere conjectures. Liability cannot rest upon
imagination, speculation or conjecture, upon a choice between two
views equally compatible with the evidence, but must be based upon
facts established by evidence fairly tending to prove them."

In the case of Wahl v. Chicago, B. & N. Ry. Co., 129 Iowa, 5,

cited with approval in Ohio R.R. Vault Co. v. Indiana Board, 237 Ill.

98, the rule is thus quoted from Asbach v. Chicago, B. & N. Ry. Co.,

74 Iowa, 248, at 250:

"A theory cannot be said to be established by circumstantial evidence,

even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent, merely, with that theory, for that may be true, and yet they may have no tendency to prove the theory. This is the well-settled rule, and it is manifest that under it plaintiff's theory is not established."

In the case of Kelley v. Public Service Co., 300 Ill. App. 354, the same doctrine is followed, the court saying at pages 361-362:

"A theory cannot be said to be established by circumstantial evidence unless the facts are of such a nature and so related as to make it the only conclusion that could reasonably be drawn. It cannot be said one fact can be inferred, when the existence of another inconsistent fact can be drawn with equal certainty."

Since there were no eye-witnesses to the accident in the instant case, the plaintiff necessarily had to prove due care on the part of decedent and negligence on the part of the defendant truck driver, by circumstantial evidence.

As to the issue of due care on the part of decedent, plaintiff relied upon the legal presumption that all persons observe the instincts of promoting the preservation of life, and the testimony of two witnesses called on behalf of plaintiff showed that decedent was a careful and prudent driver and enjoyed a reputation as such. To refute this legal presumption, the defendants rely upon the indisputable fact that the speedometer on decedent's Chevrolet car was frozen at 40 miles per hour immediately after the accident, and that his car was found between 190 and 225 feet west of the point of impact of the truck and decedent's car.

Under the evidence, we could not uphold the trial court's action in directing the verdict on the theory alone that the plaintiff had failed to establish the element of due care on the part of decedent. There remains, however, the issue as to the negligence of the defendant truck driver. The complaint contained the usual charge of general negligence in the operation of the truck

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and also several charges of specific acts of negligence. It cannot be contended that there was any evidence to support the charges of specific acts of negligence other than the charge that the truck was operated on the wrong side of the highway and in the lane of traffic in which the decedent's Chevrolet car was properly proceeding. The main issue in the case, therefore, is whether from the evidence in favor of plaintiff, standing alone, and when considered to be true, together with the inferences which may legitimately be drawn therefrom, the jury might reasonably have found for the plaintiff on either the charge of general negligence in the operation of the truck, or the charge of the specific act of negligence in the operation of the truck on the left or wrong side of the highway. Plaintiff's allegation charging general negligence in the operation of the truck has resolved itself into a charge of a specific act of negligence, namely, the act of driving the truck on the wrong side of the highway (on the north side of Main street) while proceeding in an easterly direction. The circumstantial evidence adduced by plaintiff in support of that charge consisted of the following: (1) That there was the aforesaid hump in the highway beginning at the intersection of Main and Illinois streets, lying largely in the south half of Main street, and the truck driver probably drove into the north half of Main street to avoid the hump; (2) that the running board, headlight glass, and windshield glass of the Chevrolet car were found on the pavement, north of the center line of Main street; (3) that there was a mark or groove, or scratch, 18 to 24 inches long, extending east and west, making a break in the concrete pavement on the north half of Main street, which the plaintiff's brief (at page 14) erroneously describes as "extending east and west and north to the center line of the pavement," but which his witness, at page 98 of the record, placed at "18 to 20 inches north of the center line"; and

and also several charges of specific acts of negligence. It cannot be contended that there was any evidence to support the charges of specific acts of negligence other than the charge that the truck was operated on the wrong side of the highway and in the lane of traffic in which the decedent's Chevrolet car was lawfully proceeding. The main issue in the case, therefore, is whether from the evidence in favor of Plaintiff, standing alone, and when considered to be true, together with the inferences which may lawfully be drawn therefrom, the jury might reasonably have found for the Plaintiff on either the charge of general negligence in the operation of the truck, or the charge of the specific acts of negligence in the operation of the truck on the left or wrong side of the highway. Plaintiff's allegation charging general negligence in the operation of the truck has resolved itself into a charge of a specific act of negligence, namely, the act of driving the truck on the wrong side of the highway (on the north side of Main street) while proceeding in an easterly direction. The circumstantial evidence adduced by Plaintiff in support of that charge consisted of the following: (1) That there was the aforesaid bump in the highway beginning at the intersection of Main and Illinois streets, lying largely in the south half of Main street, and the truck driver probably drove into the north half of Main street to avoid the bump; (2) That the running board, headlight glass, and windshield glass of the Chevrolet car were found on the pavement, north of the center line of Main street; (3) That there was a mark or groove, or scuff, or scratch, 18 to 24 inches long, extending east and west, making a break in the concrete pavement on the north half of Main street, which the Plaintiff's brief (at page 14) erroneously described as "extending east and west and north to the center line of the pavement," but which his witness, at page 98 of the record, placed at "18 to 20 inches north of the center line"; and

(4) that the tire or brake marks of the truck were allegedly found on the north side of Main street. Each of the above circumstances has been carefully considered, together with all inferences which may legitimately be drawn therefrom. As to the probability that the truck driver drove to the north of the center of Main street as he approached the intersection of Illinois street, in order to avoid the hump which began at that intersection, that probability appears as sheer speculation or conjecture in the absence of any other evidence that he did so drive into the wrong side of the highway. The inference drawn by plaintiff, that the truck driver would drive over to the wrong side to avoid a hump which was no higher than that which is caused by a variation of 16 inches between two sides of the road, is certainly less reasonable, than the inference that defendant's instinct of self-preservation would restrain him from driving into the path of a vehicle approaching from the opposite direction. Under the tests laid down in Gordon v. Schoenfeld, 214 Ill. 226, and Coffin v. Chicago City Ry. Co., 251 Ill. App. 169, the inference that the truck was being driven on the left of the center of Main street could not be reasonably inferred from the circumstance of the hump, even if the truck driver's awareness of its existence could be inferred. Reference is made by the plaintiff to the finding of headlight glass and windshield glass of the Chevrolet on the north half of the pavement of Main street, which he contends is indicative of the truck having crossed over to the left of the middle of the highway. Plaintiff further argues that as the left front wheel of the Chevrolet and the tire torn therefrom being found on the north side of Main street, plus the fact that the Chevrolet was found at least 190 feet west of the truck, and north of the center line of Main street, after the collision, is an indication that the Chevrolet was traveling on its proper side of the road.

(4) that the tire or brake marks of the truck were allegedly found on the north side of Main Street. Each of the above circumstances has been carefully considered, together with all inferences which may legitimately be drawn therefrom. As to the probability that the truck driver drove to the north of the center of Main Street as he approached the intersection of Illinois Street, in order to avoid the hump which began at that intersection, that probability appears as sheer speculation or conjecture in the absence of any other evidence that he did so drive into the wrong side of the highway. The inference drawn by plaintiff, that the truck driver would drive over to the wrong side to avoid a hump which was no higher than that which is caused by a variation of 18 inches between two sides of the road, is certainly less reasonable, than the inference that defendant's instant of self-observation would restrain him from driving into the path of a vehicle approaching from the opposite direction. Under the facts laid down in Condon v. Schoenfeld, 214 Ill. 226, and Goffin v. Chicago City Ry. Co., 201 Ill. App. 189, the inference that the truck was being driven on the left of the center of Main Street could not be reasonably inferred from the circumstance of the hump, even if the truck driver's awareness of its existence could be inferred. Reference is made by the plaintiff to the finding of headlight glass and windshield glass of the Chevrolet on the north half of the pavement of Main Street, which he contends is indicative of the truck having crossed over to the left of the middle of the highway. Plaintiff further argues that as the left front wheel of the Chevrolet and the tire torn therefrom being found on the north side of Main Street, plus the fact that the Chevrolet was found at least 180 feet west of the truck, and north of the center line of Main Street, after the collision, is an indication that the Chevrolet was traveling on its proper side of the road.

Plaintiff's witness Joseph Pociask, chief of police of Lemont, testified that the mark of impact on the truck was back of the cab and about a foot back of the front end of the tank. If the front or the left front end of the truck had struck the Chevrolet, some evidence of damage to that part of the truck, at least in the form of broken glass, would have been available. As a matter of fact, the only evidence as to the damage to the truck was that the rear wheels and axle of the truck were found some distance south of Main street. We are of the opinion that it is as reasonable an inference as any proposed by the plaintiff, that the left front of the Chevrolet struck the truck while it was proceeding on its own side of the road and thereupon careened over the north half of Main street for a distance of about 190 feet.

It is next contended by plaintiff that the finding on the pavement north of the center line of Main street of a mark or groove 18 to 24 inches in length at about the place of the collision would indicate that the tractor or some part thereof was on the wrong side of the highway and that the jury should have been given an opportunity to consider the relative weight of the Chevrolet and the truck tractor so that it might determine as a matter of fact whether this mark or groove in the pavement was caused by the tractor or some part thereof. This contention is disposed of by reference to the statement of plaintiff's principal and only witness on this point, witness Pociask, who testified that this mark "was not made by the truck" and "brake marks of the truck were on his side of the road, showed where he had applied his brakes for 8 or 10 feet." From plaintiff's evidence it is clearly shown that the truck was traveling on its right side of the road and the inference could not be drawn from the evidence as we view it that the groove or mark found in the pavement was caused by the truck or any part thereof.

The foregoing disposes of all the evidentiary factors relied upon by the plaintiff in contending that there was sufficient evidence of the defendants' negligence to constrain the trial court to deny defendants' motion for a directed verdict. It is our view that the evidence, with all reasonable inferences to be drawn therefrom in favor of plaintiff failed to prove any negligence on the part of the truck driver. We are of the opinion that the trial court was correct in directing a verdict in favor of the defendants.

For the reasons indicated, the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

The foregoing discussion of all the evidentiary factors relied upon by the plaintiff in contending that there was sufficient evidence of the defendant's negligence to constrain the trial court to deny defendant's motion for a directed verdict. It is our view that the evidence, with all reasonable inferences to be drawn therefrom in favor of plaintiff failed to prove any negligence on the part of the wreck driver, we are of the opinion that the trial court was correct in directing a verdict in favor of the defendant.

For the reasons indicated, the judgment of the trial court

Court of Cook County is affirmed.

JUDGMENT OF THE COURT

BURKE, P.J. AND KELLY, J. CONCUR.

BANKERS BUILDING, INC.,
Appellee,

v.

HOWARD F. BISHOP,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3281A.256

MR. JUSTICE LUPE DELIVERED THE OPINION OF THE COURT.

On March 25, 1942, a judgment by confession was entered in favor of plaintiff and against defendant for the sum of \$14,814.66 and costs, which included the sum of \$784.03 allowed to plaintiff as attorney's fees. The judgment was based upon three separate leases for three successive terms, covering the leasing by plaintiff to defendant of the 37th floor of the Bankers Building in Chicago, Illinois. The defendant, by his original and supplemental verified petitions moved the court to vacate the judgment. Plaintiff acknowledged receipt of the sum of \$272.36 since the entry of the judgment and credit was given upon the judgment for this amount. Leave was given defendant to defend as to the sum of \$763.97 and execution was directed to issue for the net balance of \$13,778.33. Defendant appealed.

The complaint contained three counts, each count declaring upon a separate lease for the same space in the Bankers Building in Chicago. The lease first in point of time ran from May 1, 1937 to April 30, 1938; the second lease ran from May 1, 1938 to April 30, 1939; and the third lease commenced on May 1, 1939 and expired April 30, 1940. The complaint alleged that there was due on the first lease a balance of rent amounting to \$55.76, plus \$14.80 interest, and that there was due the sum of \$6000 on each of the second and third leases.

HANKERS BUILDING, INC.,

Appellee,

v.

HOWARD F. BISHOP,

Appellant.

On March 22, 1942, a judgment of court was entered in favor of plaintiff and against defendant for the sum of \$14,814.88 and costs, which included the sum of \$184.00 allowed to plaintiff as attorney's fees. The judgment was based upon three separate leases for three successive terms, covering the

leasing by plaintiff to defendant of the 37th floor of the Bankers Building in Chicago, Illinois. The defendant, by his original and supplemental verified petitions moved the court to vacate the judgment. Plaintiff acknowledged receipt of the sum of \$184.00 since the entry of the judgment and credit was given upon the judgment for this amount. Leave was given defendant to defend as to the sum of \$755.97 and execution was directed to issue for the net balance of \$14,778.88. Defendant appealed.

The complaint contained three counts, each count dealing upon a separate lease for the same space in the Bankers Building in Chicago. The lease first in point of time ran from May 1, 1937 to April 30, 1938; the second lease ran from May 1, 1938 to April 30, 1939; and the third lease commenced on May 1, 1939 and expired April 30, 1940. The complaint alleged that there was due on the first lease a balance of rent amounting to \$55.76, plus \$1.80 interest, and that there was due the sum of \$2000 on each of the second and third leases.

The defendant claims that the three leases provide that all rentals (except certain sums) were to be paid in legal services; that defendant was ready, willing and able to perform legal services as requested by plaintiff, and, hence, there was no liability. Such contention on the part of defendant makes it necessary to construe the leases.

Paragraph 1 of the first lease provides that defendant is to pay plaintiff the sum of \$6000 "in coin or currency" in six installments of \$250 each, beginning November 1, 1937, the balance to be offset through the medium of legal services rendered by defendant for plaintiff "as per rider." The rider provides in substance:

(1) Payment of all rents due under lease dated September 27, 1937, covering the entire 37th floor of the Bankers Building is to be made as per paragraph 1 of the attached lease;

(1-a) That the lessee is to perform certain legal services for the lessor and it was agreed that when lessee is paid for said services he shall pay the same to the lessor until the term rental called for under the lease is paid in full;

(1-b) Lessee is to perform certain legal services for other corporations and that when he is paid for such services by said corporations he shall pay to the lessor such sums so received by him until the term rental is paid in full;

(2) Lessee agreed to furnish letters to the lessor assigning all fees mentioned in paragraph 1-b, naming all the corporations and the approximate amount of fees expected for legal services that are to be rendered;

(3) That any moneys paid to the lessee by lessor for legal services performed in accordance with this agreement shall be credited to the rent account of \$3,973.35 covering occupancy by the lessee of the 37th floor from May 1, 1935 to April 30, 1937 under lease dated May 10, 1935;

The defendant claims that the three leases provide that all rentals (except certain taxes) were to be paid in legal services; that defendant was ready, willing and able to perform legal services as requested by plaintiff, and, hence, there was no liability. Such contention on the part of defendant, which is necessary to constitute the defense.

Paragraph 1 of the first lease provides that defendant is to pay plaintiff the sum of \$100 "in coin or currency" in six installments of \$20 each, beginning November 1, 1937, the balance to be offset through the billing of legal services rendered by defendant for plaintiff "as per rider." The rider provided in substance:

(1) Payment of all bills under lease dated September 27, 1937, covering the entire 27th floor of the Bankers Building is to be made as per paragraph 1 of the attached lease;

(1-a) That the lessee is to perform certain legal services for the lessor and it was agreed that when lessee is paid for said services he shall pay the rent to the lessor until the term rental called for under the lease is paid in full;

(1-b) Lessee is to perform certain legal services for other corporations and that when he is paid for such services by said corporations he shall pay to the lessor such sums so received by him until the term rental is paid in full;

(2) Lessee agreed to furnish letters to the lessor assigning all fees mentioned in paragraph 1-b, naming all the corporations and the approximate amount of fees expected for legal services that are to be rendered;

(3) That any moneys paid to the lessee by lessor for legal services performed in accordance with this agreement shall be credited to the rent account of \$3,978.35 covering occupancy by the lessee of the 27th floor from May 1, 1935 to April 30, 1937 under lease dated May 10, 1935;

(3-a) When the aforementioned account has been paid in full any moneys paid to the lessee by lessor for legal services performed in accordance with this agreement shall be credited to the rent account of this lease in accordance with the terms of paragraph 1 of this lease, with the definite understanding and agreement that the lessee will continue to render legal services to the lessor until such time as said rent account has been paid in full by said legal services;

(4) It was agreed that all electric light and other miscellaneous bills that became due and payable shall be paid on the first day of each current month during the term of this lease.

In construing the leases defendant contends that the wording of the leases is ambiguous, permitting a resort to extrinsic evidence in order to determine the intent of the parties by conversations and correspondence between the parties and acts of the plaintiff showing its interpretation of the claimed ambiguous wording of the leases to be that all of the rental reserved in the three leases, except a portion thereof to be paid in cash, was to be paid by defendant solely and exclusively from legal services to be performed by defendant for plaintiff. We have examined the language which is in controversy, and we are of the opinion that this language in each of the three leases is not ambiguous, and that a proper construction of the leases can be made without resorting to extrinsic evidence.

The first lease provides that defendant is to pay plaintiff the sum of \$6000 "in coin or currency" in six installments of \$250 each, beginning November 1, 1937, the balance to be offset through the medium of legal services rendered by defendant for plaintiff as "per attached rider". The rider specified that the payment of all rents due under the lease was to be payment as specified on the attached lease, which language of the attached lease is given above; that defendant was to perform certain legal services for plaintiff and when plaintiff was paid for said services, defendant should pay

(3-a) When the aforementioned account has been paid in

all any money paid to the lessee by lessor for legal services performed in accordance with this agreement shall be credited to the rent account of this lease in accordance with the terms of paragraph 1 of this lease, with the definite understanding and agreement that the lessee will continue to render legal services to the lessor until such time as said rent account has been paid in full of said legal services;

(4) It was agreed that all electric light and other miscellaneous bills that become due and payable shall be paid on the first day of each current month during the term of this lease.

In construing the lease defendant contends that the wording of the lease is ambiguous, permitting a resort to extrinsic evidence in order to determine the intent of the parties by conversations and correspondence between the parties and acts of the plaintiff showing the interpretation of the claimed ambiguous wording of the lease to be that all of the rental reserved in the three leases, except a portion thereof to be paid in cash, was to be paid by defendant solely and exclusively for legal services to be performed by defendant for plaintiff. We have examined the language which is in controversy, and are of the opinion that this language in each of the three leases is not ambiguous, and that a proper construction of the leases can be made without resorting to extrinsic evidence.

The first lease provides that defendant is to pay plaintiff the sum of \$6000 "in coin or currency" in six installments of \$1000 each, beginning November 1, 1937, the balance to be offset through the medium of legal services rendered by defendant for plaintiff as per attached rider. The rider specified that the payment of all rents due under the lease was to be payment as specified on the attached lease, which language of the attached lease is given above; that defendant was to perform certain legal services for plaintiff and when plaintiff was paid for said services, defendant should pay

plaintiff all moneys received by him until the term rental called for under the lease was paid in full; that defendant was to perform legal services for other corporations and when defendant was paid for these services by said corporations that defendant should pay to the lessor all moneys received by him until the term rental was paid in full; that defendant was to furnish assignments of fees to be paid by said other corporations; and any moneys paid to defendant by lessor for legal services in accordance with the agreement should be credited to the rent account of defendant amounting to \$3973.35, which accrued and remained unpaid under lease dated May 10, 1935; that when said sum had been paid in full, any moneys paid to defendant by plaintiff for legal services performed, in accordance with the agreement, should be credited to the rent of the lease in accordance with Paragraph 1 of the lease, with the definite agreement that defendant would continue to render legal services to plaintiff until such time as said rental had been paid in full by said legal services.

We agree with the legal proposition announced in City of Chicago v. Weir, 165 Ill. 582, and Hungate v. New York Life Insurance Co., 267 Ill. App. 257, to the effect that the typewritten portion of an instrument prevails over the printed portion thereof, but we do not see how it is applicable here. The portion of the lease providing for the amount of the rental (\$6000) is not printed but is typewritten, so there can be no question that the rental was such sum. The lease provides that "the balance of the rent called for in this lease to be offset through the medium of legal services rendered by lessee for the lessor, as per attached rider." In our opinion the words "as per attached rider" control the language of the lease itself and that we must look to the language of the rider for our interpretation of the contract between the parties.

The provision in the rider that defendant was to perform certain legal services for plaintiff and that when defendant was paid for these services that the defendant would pay to plaintiff all

plaintiff all moneys received by him until the term rental called for under the lease was paid in full; that defendant was to perform legal services for other corporations and when defendant was paid for these services by said corporations that defendant should pay to the lessor all moneys received by him until the term rental was paid in full; that defendant was to furnish assignments of lease to be paid by said other corporations; and any moneys paid to defendant by lessor for legal services in accordance with the agreement should be credited to the rent account of defendant amounting to \$2975.00,

which accrued and remained unpaid under lease dated May 10, 1933; that when said sum had been paid in full, any moneys paid to defendant by plaintiff for legal services performed, in accordance with the agreement, should be credited to the rent of the lease in accordance with paragraph 1 of the lease, with the definite agreement that defendant would continue to render legal services to plaintiff until such time as said rental had been paid in full by said legal services.

We agree with the legal proposition announced in City of

Chicago v. Weir, 186 Ill. 522, and Huntz v. New York Life Insurance

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be offset through the medium of legal services rendered by lessor for

the lessor, as per attached rider." In our opinion the words "as

per attached rider" control the language of the lease itself and that

one must look to the language of the rider for our interpretation of

the contract between the parties.

The provision in the rider that defendant was to perform

certain legal services for plaintiff and that when defendant was

paid for these services that the defendant would pay to plaintiff all

such moneys received by him on account of the rental until the rental reserved in the lease was paid in full, is identical in form with the provision in the rider in a separate paragraph thereof, that defendant was to perform legal services for other corporations. There is no provision in the lease or the rider that plaintiff agreed that the other corporations would hire and employ defendant to perform any particular legal services or for any particular amount. It cannot be said that if the "other corporations" had failed to submit legal work to defendant for his performance of the same, that plaintiff would be liable as and for a breach of contract. And the paragraph with reference to the performance by defendant of legal services for plaintiff cannot be construed to mean that if plaintiff had failed to furnish defendant with legal work defendant would have been relieved from his obligation to pay rent, nor could plaintiff be held liable as and for a breach of contract in the event it did not tender work to plaintiff for his performance. Also the language of the rider that "lessee is to perform certain legal services for the lessor"; "lessee is to perform certain legal services for other corporations"; and "with the definite understanding and agreement that the lessee will continue to render legal services to the lessor until such time as said rental account had been paid in full by said legal services"; taken in connection with the fact that there was no positive agreement by plaintiff to furnish legal work to defendant to be performed by him, means that the agreement of defendant to perform legal services for plaintiff and other corporations is an additional security to plaintiff as a means of collecting the rental to be due under the terms of the lease. At the time of making the lease, the defendant (according to the terms of the rider) was already indebted for past-due rent on a previous lease in the sum of \$3973.35, which amount defendant duly acknowledged and agreed to pay,

such money received by him on account of the rental until the rental reserved in the lease was paid in full, is identical in form with the provision in the rider in a separate paragraph thereof, that defendant was to perform legal services for other corporations. There is no provision in the lease or the rider that plaintiff agreed that the other corporations would hire and employ defendant to perform any particular legal services or for any particular amount. It cannot be said that if the "other corporations" had failed to submit legal work to defendant for his performance of the same, that plaintiff would be liable as and for a breach of contract. And the paragraph with reference to the performance by defendant of legal services for plaintiff cannot be construed to mean that if plaintiff had failed to furnish defendant with legal work defendant would have been relieved from his obligation to pay rent, nor could plaintiff be held liable as and for a breach of contract in the event it did not tender work to plaintiff for his performance. Also the language of the rider that "lessee is to perform certain legal services for the lessor"; "lessee is to perform certain legal services for other corporations"; and "with the latitude understanding and agreement that the lessee will continue to render legal services to the lessor until such time as said rental account has been paid in full by said legal services"; taken in connection with the fact that there was no positive agreement by plaintiff to furnish legal work to defendant to be performed by him, means that the agreement of defendant to perform legal services for plaintiff and other corporations is an additional security to plaintiff as a means of collecting the rental to be due under the terms of the lease. At the time of making the lease, the defendant (according to the terms of the rider) was already indebted for past-due rent on a previous lease in the sum of \$2973.35, which amount defendant duly acknowledged and agreed to pay,

and the defendant would presently be indebted in the further sum of \$6000 as and for the rental for the ensuing year. Under these conditions the parties agreed that defendant should pay the past-due rental and the current rental and that plaintiff, in addition, had the legal right to tender certain legal work to be performed by defendant, and that any payments made for such legal services were to be repaid by defendant to plaintiff to apply on the past-due and current rental.

The fact that neither the lease nor the rider contained any covenant or agreement on the part of plaintiff to furnish defendant with legal work; that the agreement of defendant to perform legal services is in effect an additional security or method by which plaintiff can receive payment of its rental in the event that defendant failed to pay same in cash; that the agreement of defendant to perform such services tendered to him by plaintiff is in similar form to the defendant's agreement to perform legal services for other corporations; leads us to conclude that the proper construction of the rider in connection with Paragraph 1 of the lease is that the obligation of defendant to pay the term rental of \$6000 is absolute, with the privilege accorded to plaintiff of employing defendant's legal services and offsetting the amount charged for such legal services against any unpaid rental not paid in cash by defendant.

The second lease provides for the payment of \$6000 in coin or currency "as per attached rider." There were two riders attached, the second of which is identical in wording with the rider attached to the first lease; the only difference is between the stated term of the lease and the amount of past-due rental, which included the balance due on the first lease.

The third lease and the rider attached thereto is identical in wording with the rider attached to the first lease and the second rider attached to the second lease. Our construction

and the defendant would presently be indebted in the further sum of \$6000 as and for the rental for the ensuing year. Under these conditions the parties agreed that defendant should pay the past-due rental and the current rental and that plaintiff, in addition, had the legal right to tender certain legal work to be performed by defendant, and that any payments made for such legal services were to be recouped by defendant to plaintiff to apply on the past-due and current rental.

The fact that neither the lease nor the rider contained any covenant or agreement on the part of plaintiff to furnish defendant with legal work; that the agreement of defendant to perform legal services is in effect an additional security or method by which plaintiff can receive payment of its rental in the event that defendant failed to pay same in cash; that the agreement of defendant to perform such services tendered to him by plaintiff is in similar form to the defendant's agreement to perform legal services for other corporations; leads us to conclude that the proper construction of the rider in connection with paragraph 1 of the lease is that the obligation of defendant to pay the term rental of \$6000 is absolute, with the privilege accorded to plaintiff of employing defendant's legal services and offsetting the amount charged for such legal services against any unpaid rental not paid in cash by defendant.

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The third lease and the rider attached thereto is identical in wording with the rider attached to the first lease and the second rider attached to the second lease. Our construction

of these riders is the same as our construction of the rider attached to the first lease.

The second lease contains an additional rider which provides in substance for certain interim payments in cash to be made by the lessee, depending upon the amount of sub-rents to be received by lessee for certain offices enumerated, in the space rented by said lessee, and it further provides that as long as certain offices in said space were not sublet, lessee will not be obligated to pay \$250 per month in cash but that said amount will be paid in legal services only. It is urged by defendant that this provision of the rider is sufficient to compel the construction that the amount specified for the term rent was to be paid in legal services (except so much as was therein provided to be paid in cash). With this contention we cannot agree.

There can be little doubt that under the terms of this rider if no sub-rents were received by the lessee the entire \$6000 was to be paid in unspecified instalments and at unspecified times up to the end of the lease out of fees for legal services received by lessee from the lessor and other corporations, and, in the event that no fees were received by defendant, there still remained the primary covenant of the lease to pay the \$6000 in coin or currency. Had it been the intention of the parties that the lessee was to pay the term rental in legal services except so much thereof to be paid in cash, there would have been an affirmative covenant by lessor to employ lessee or it would have obligated lessor to obtain lessee's employment by other corporations where fees could have been earned by lessee to pay the amount of rental specified in said lease. We further find the acknowledgment in the third lease of the amount due and unpaid under the terms of the second lease, which amounted to \$8,473.35, and if it had been intended that the amount due under the second lease was to be paid solely in services, surely the defendant would not have acknowledged in the third lease that he was indebted to

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attached to the first lease.

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by lessee for certain offices enumerated, in the case rented by

said lessee, and it further provides that in case of certain offices

in said space were not sublet, lessee will not be obligated to pay

\$800 per month in cash but that said amount will be paid in legal

services only. It is urged by defendant that this provision of the

rider is sufficient to compel the conclusion that the amount

specified for the term rent was to be paid in legal services because

as much as was therein provided to be paid in cash, with this

contention we cannot agree.

There can be little doubt that under the terms of this rider

if no sub-rents were received by the lessee the entire \$800 was to

be paid in unspecified installments and not necessarily in cash as to the

end of the lease out of fees for legal services received by lessee

from the lessee and other corporations, in the event that no

fees were received by defendant, there still remained the twenty

percent of the lease to pay the \$800 in cash or otherwise. Had it

been the intention of the parties that the lessee was to pay the term

rental in legal services except so much thereof to be paid in cash,

there would have been an affirmative covenant by lessee to employ

lessee or it would have obligated lessee to obtain lessee employment

by other corporations where fees could have been earned by lessee to

pay the amount of rental specified in said lease. We further find

the acknowledgment in the third lease of the amount due and unpaid

under the terms of the second lease, which amounted to \$8,475.33,

and it had been intended that the amount due under the second

lease was to be paid solely in services, surely the defendant would

not have acknowledged in the third lease that he was indebted to

plaintiff for said sum which remained due and unpaid under the second lease.

As to the three leases, the term rental was fixed at \$6000. In addition thereto defendant agreed to pay the balance due on former leases after allowing all credits, and in each instance, defendant agreed he was not to have the right to offset fees against new rent "until the aforementioned account had been paid in full." If the defendant was to pay the rent only if and when earned by legal services rendered, as contended by defendant, there would have been no primary covenant to pay the entire rent in coin or currency, nor would there have been permission given to defendant to offset the rent by fees to be received for legal services, and the leases would have provided for the discharge of the rent by the performance of legal services. By the use of the word "offset" it is indicated that there was an existing liability on the part of defendant, and not a conditional one which was dependent upon any future employment of defendant by plaintiff or other corporations.

We are of the opinion that the amount of the term rental as specified in Paragraph 1 of each of said leases was to be paid in cash, with the privilege to defendant of offsetting fees for services rendered by him to plaintiff and certain other corporations.

It is contended by plaintiff that the petition and supplemental petition filed to vacate the judgment by confession do not comply with Rules 15 and 26 of the Supreme Court and Rule 47 of the Circuit Court of Cook County. Rules 15 and 26 of the Supreme Court and Rule 47 of the Circuit Court, when read together, require that the affidavit in support of a motion to vacate a judgment by confession must be made on the personal knowledge of the affiant and must set forth with particularity the facts upon which the defense is based, and shall not

plaintiff for said sum which remained due and unpaid under the second lease.

As to the three leases, the first lease was dated at 1900.

In addition thereto defendant agreed to pay to plaintiff one on former lease after allowing all credits, and in each instance,

defendant agreed to have the right to offset the same against

new rent "until the aforementioned account has been paid in full."

If the defendant was to pay the rent only in and then covered by the

services rendered, as contended by defendant, there would have been

no primary covenant to pay the entire rent in cash or otherwise, nor

would there have been any obligation upon defendant to offset the

rent by fees to be received for legal services, and the latter would

have provided for the discharge of the rent by the performance of

legal services. By the use of the word "offset" it is indicated

that there was an existing liability on the part of defendant, and not

a conditional one which was dependent upon any future employment of

defendant by plaintiff or other corporations.

We are of the opinion that the amount of the term rental

as specified in Paragraph 1 of each of said leases was to be paid

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It is contended by plaintiff that the petition and supplemental

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consist of conclusions, but of such facts as would be admissible in evidence, and it must affirmatively appear from the affidavit that if the affiant were sworn as a witness he could testify competently thereto. In Paragraphs 18 of the petition and 6 of the supplemental petition, defendant alleged, "Upon information and belief * * * that after May 1, 1940, a separate account was opened on the books of the plaintiff and maintained by it for the purpose of distinguishing said account, which was to be paid in cash from the former account which was to be paid and offset in services". This allegation being based upon information and belief does not meet the requirement of Rule 15 of the Supreme Court. It clearly shows that the affiant lacked personal knowledge and he could not competently testify to the alleged facts stated therein. Paragraph 16 of the original petition alleges that on June 14, 1935, January 14, 1936, March 30, 1941 and June 6, 1941, various conversations took place between the defendant and the officers and agents of plaintiff, wherein the "officers agreed that the balance of the rental provided for in said respective leases was not to be paid in cash but that plaintiff would employ the defendant to perform legal services in payment of said rental". The alleged conferences and discussions of June 14, 1935 and January 14, 1936, were had long prior to the execution of the first lease and the conferences under date March 30, 1941 and June 6, 1941, occurred after the expiration of the third lease. These conferences and discussions would not be admissible to prove the meaning and intent of the language used in any of the three leases. Any testimony regarding these discussions would merely amount to an attempt to vary the terms of the leases by parol. Affidavits to vacate a judgment by confession, which purport to set forth agreements not contained in the lease, are insufficient. (Stead v. Craine, 256 Ill. App. 445, 451.) We further find that this paragraph is based upon

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941, occurred after the expiration of the third lease. These
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the plaintiff and maintained by it for the purpose of distinguishing
that after May 1, 1940, a separate account was opened on the books
petition, defendant alleged, "Upon information and belief" * * *
hereto. In Paragraphs 15 of the petition and 5 of the supplemental
the affidavit were sworn as a witness he could testify competently
affidavits, and it must affirmatively appear from the affidavit that
consist of conclusions, but of such facts as would be admissible in

the conclusion of the defendant, wherein he says, "that in said discussion said officers agreed that the balance of the rental," etc. The rule is well settled that an affidavit supporting a motion to vacate a judgment by confession should allege facts and not mere conclusions (Wasem v. Metropolitan Life Ins. Co., 269 Ill. App. 275; Davis v. Mosbacher, 252 Ill. App. 536.) Other paragraphs of the petition and supplemental petition, as grounds to vacate the judgment, allege cross-statements and counter-claims. It is the well settled rule that judgment by confession will not be opened to permit a defendant to file a counter-claim or cross-statement. (Busse v. Muller, 295 Ill. App. 101; Stead v. Craine, 256 Ill. App. 445; Koehler v. Glaum, 169 Ill. App. 537.) If the defendant has a claim or claims against the plaintiff he has his remedy. He may institute proceedings for the purpose of enforcing the same, and, if they are well founded the courts will grant him redress. Defendant complains that plaintiff filed a counter-affidavit which went to the merits of his defense, and that the court failed to strike said counter-affidavit. From a reading of the order entered at the time of the hearing of defendant's motion to vacate the judgment, it is plain to be seen that the court did not consider the counter-affidavit in ruling upon said motion. The order entered by the trial judge expressly provides in Paragraph 1 thereof, that he gave no effect to the counter-affidavit of plaintiff. It is the rule that counter-affidavits interposed in connection with motions to open judgments by confession should not be considered on questions of fact raised as to the merits of the case. (Stranak v. Tomasovic, 309 Ill. App. 177.) The same rule now prevails under the provision of the Practice Act and Rule 15 of the Supreme Court. (Walrus Mfg. Co. v. Wilcox, 303 Ill. App. 286.)

It is contended that no date is fixed when the rent was payable in the leases with certain exceptions and therefore the

the conclusion of the defendant, wherein he says, "that in said discussion said officers agreed that the defendant of the rental, etc. The rule is well settled that an affidavit and motion to vacate a judgment by confession should be filed and not mere conclusions (Green v. Metropolitan Life Ins. Co., 303 Ill. 275; Davis v. Kossuth, 303 Ill. 277). Any suggestion of the petition and any amended petition, or motion to vacate the judgment, after cross-statements and counter-affidavits, is the well settled rule that judgment by confession will not be entered to permit a defendant to file a counter-affidavit or cross-statement. (Brass v. Sullivan, 303 Ill. 267; Smith v. Kline, 303 Ill. 443; Koenig v. Shaw, 303 Ill. 277). If the defendant has a claim or claims against the plaintiff, he has his remedy. He may institute proceedings for the purpose of recovering the same, and if they are well founded the court will grant his request. Defendant complains that plaintiff filed a counter-affidavit which went to the merits of his defense, and that the court failed to strike said counter-affidavit. From a reading of the order entered at the time of the hearing of defendant's motion to vacate the judgment, it is plain to be seen that the court did not consider the counter-affidavit in ruling upon said motion. The order entered by the trial judge expressly provides in Paragraph I thereof, that he gave no effect to the counter-affidavit of plaintiff. It is the rule that counter-affidavits interposed in connection with motions to open judgments by confession should not be considered on questions of fact raised as to the merits of the case. (Stranah v. Longessimo, 303 Ill. App. 177). The same rule now prevails under the provision of the Practice Act and Rule 15 of the Supreme Court. (Walrus Mfg. Co. v. Wilcox, 303 Ill. App. 286.)

It is contended that no date is fixed when the rent was payable in the leases with certain exceptions and therefore the

plaintiff was not entitled to confess judgment under the lease. This would not prevent the plaintiff from confessing judgment under the power given it by the terms of the lease. True the leases did not, with certain exceptions, specify when the rental was to be paid during each of their respective terms. However, the law is well settled that when the amount of the annual rental is fixed in a lease but no dates are specified for their payment, no custom or usage to the contrary being shown, the same were payable at the end of the year. (Barnard v. Triangle Music Co., 1 Wash. (2d) 41.) Plaintiff is entitled to interest from the last day of the term of each of said leases, as provided for in the first paragraph of said leases.

We have considered the many other contentions of defendant and have examined the authorities submitted in support thereof, but, considering the view we take in this case, we deem it unnecessary to discuss them.

After a careful examination of the petition and supplemental petition, we feel that the court was correct in his ruling denying leave to open the judgment excepting as to the sum of \$763.97. A motion to vacate a judgment entered by confession is addressed to the sound legal discretion of the trial court and his action in denying it will not be reviewed unless it appears that such discretion has been abused. (Koehler v. Glaum, 169 Ill. App. 537; Blake v. State Bank of Freeport, 178 Ill. 182.)

During oral argument, plaintiff's attorney stated that since the appeal was perfected, defendant became entitled to a credit of \$620.70. Therefore the judgment of the Circuit Court is modified by reduction to \$13,157.63, thereby giving effect to the credit which defendant is admittedly entitled to; and, as modified, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

plaintiff was not entitled to collect judgment under the lease. This would not prevent the plaintiff from collecting judgment under the power given it by the terms of the lease. From the lease did not, with certain exceptions, specify when the rental was to be paid during each of their respective terms. However, the law is well settled that when the amount of the annual rental is fixed in a lease but no dates are specified for their payment, no action or remedy to the contrary being shown, the same were payable at the end of the year. (Bernard v. Atlantic Mills Co., 100 N.J. 100, 101 A. 2d 101, 102 A. 2d 101) Plaintiff is entitled to interest from the first day of the term of each of said leases, as provided for in the first section of said leases. We have considered the many other contentions of defendant and have examined the authorities submitted in support thereof, but, considering the view we take in this case, we deem it unnecessary to discuss them.

After a careful examination of the petition and supplemental petition, we feel that the court was correct in its ruling setting aside to open the judgment excepting as to the sum of \$23,977. A motion to vacate a judgment entered by confession is addressed to the sound legal discretion of the trial court and its action in denying it will not be reviewed unless it appears that such discretion has been abused. (Kochler v. State, 189 Ill. App. 537; Blake v. State Bank of Wisconsin, 178 Ill. 182.)

During oral argument, plaintiff's attorney stated that since the appeal was perfected, defendant became entitled to a credit of \$20.70. Therefore the judgment of the Circuit Court is modified by reduction to \$13,157.55, thereby giving effect to the credit which defendant is admittedly entitled to; and, as modified, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILBY, J. CONCUR.

42732

EMIL DENEMARK and JENNIE DENEMARK,
Appellants,
vs.
ARLINGTON PARK JOCKEY CLUB, INC.,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

32614.256

MR. JUSTICE LUPE DELIVERED THE OPINION OF THE COURT.

This is an action brought by plaintiffs against defendant to recover damages sustained by plaintiffs on account of injuries to a race horse named War Minstrel belonging to plaintiffs, the injuries being caused by the alleged negligence of defendant while the horse was running a race on the race track of defendant.

Upon motion of the defendant the amended complaint was stricken for failure to state a cause of action and, plaintiffs electing to stand upon said amended complaint, the court dismissed plaintiffs' suit at plaintiffs' costs and entered judgment thereon. This appeal of plaintiffs is to reverse that judgment.

Plaintiffs' amended complaint alleges that on July 9, 1941, they owned and operated a thoroughbred horse racing stable and among the horses owned by them was a seven year old gelding named War Minstrel, and that this horse was known throughout the racing world as a sterling handicap racer and had won in purses in excess of \$65,000, and was then of the cash value of \$25,000. That on the 30th day of June, 1941, pursuant to nomination made by plaintiffs and the payment by plaintiffs to defendant of a nominating fee and entry fee of \$50, War Minstrel was entered by plaintiffs at the request of defendant in a race known as the

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Grassland Handicap which was being run on defendant's track on the 9th day of July, 1941; that defendant was engaged in maintaining and operating and conducting a thoroughbred horseracing meeting, and that it owned, maintained and operated and controlled a racetrack and race grounds as part of which were a dirt track and a grass or turf track, and that the same was located at or near the Village of Arlington Heights in Cook County, Illinois; that under the terms and conditions imposed by defendant and accepted by plaintiffs the race was required to be run on the turf or grass course, said course being within the infield of the regular track on the race grounds; that at said time and place War Minstrel was competing for a prize or purse offered by defendant to the owners of horses entered and competing in the race; that War Minstrel was in a fit and sound condition and was ridden by a jockey who was thoroughly competent and skilled in the riding, guiding and management of racehorses and who at all times herein mentioned was in the exercise of due care for the safety of said horse and skilfully used due care in riding and managing the horse; that during the running of the race War Minstrel, without any negligence on the part of plaintiffs or their agents or servants, was forced off of the turf course and into and through the hedge then and there skirting said course, unseating his rider, and that War Minstrel then and there became loose and free, and while riderless ran after the field of horses which were running said race, without guidance and control of a jockey, and that War Minstrel then ran into and was caught and tripped on a fence consisting of stout woven wire which reached across the infield from the inner edge of the turf track on its northerly side in a southwesterly direction to the inner edge of the turf track on its southerly side and was about 600 feet long; and that the same was not a regular fence necessary or proper to the maintenance and operation of

Grassland Handicap which was held on a regular basis at the
the 2nd day of July, 1921; that defendant was engaged in
maintaining and operating the same as a regular business
horse racing meeting, and that it was, maintained, and operated
and controlled a racetrack and race course at the same time
a dirt track on a piece of land owned by defendant, which was
located at or near the village of Clinton, Illinois, in
County, Illinois; that defendant was and conditionally imposed
by defendant and accepted by plaintiff the race was to be run
to be run on the turf or grass course, and defendant was to
the infield of the race track in the race course; that at
said time and place defendant was operating the same as a
purse offered as defendant to the winner of the race and
competing in the race; that defendant was in a fit and sound
condition and was ridden by a jockey who was thoroughly competent
and skilled in the riding, guiding and management of racehorses
and who at all times herein mentioned was in the exercise of
due care for the safety of said horse and skillfully used the
same in riding and managing the horse; that during the running
of the race said jockey, without any negligence on the part
plaintiff or their agents or servants, was forced out of the
turf course and into and through the hedge fence and there striking
said course, upsetting his rider, and that said jockey then and
there became loose and free, and while riderless ran after the
infield of horses which were running said race, without guidance
and control of a jockey, and that said jockey then ran into
and was caught and tripped on a fence consisting of about seven
wires which reached across the infield from the inner edge of
the turf track on its northerly side in a southeasterly direction
to the inner edge of the turf track on its southerly side and
was about 600 feet long; and that the same was not a regular
fence necessary or proper to the maintenance and operation of

defendant's racetrack; that said fence had been a temporary obstruction and was erected by defendant on July 3, 1941, for the sole purpose of providing space and room for an overflow of patrons attending the races of defendant on July 4, 1941, and that said obstruction was not necessary to be maintained by defendant, and that it had never been before maintained by defendant when a turf race was run on the grass or turf course; that defendant by and through its agents, servants and employees, negligently and carelessly erected and placed said fence at the place aforesaid, and that it failed to remove the same and that it carelessly, negligently and improperly suffered and permitted the same to remain for more than five days after July 4, 1941, up to and including July 9, 1941.

Plaintiffs further alleged that the wire fence so placed and maintained by defendant made the racetrack dangerous and unsafe to any horse running in the race on the grass course or turf course and that any horse running a race on said grass or turf course was likely to run into and against and be injured by the wire fence, all of which was known to the defendant or by the exercise of due care would have been known to it.

Plaintiffs further allege that there was no fence on the inner side of the turf or grass course between the course and the infield sufficient to prevent or restrain a horse running on the turf or grass course from leaving the same and entering into the infield where the wire fence was placed, and that horses running races on a turf or grass course were likely to bolt from and leave the track and go into the infield; that the Grassland Handicap was required by defendant to be run by the owners of the horses upon the turf or grass course of defendant and that each horse which ran in the race was under the direction and management of defendant; that there were ten horses entered in the race and that each one was under the direction of defendant,

its agents or servants; that the grass or turf course on its inside or infield had no barrier or fence to prevent horses running upon the grass or turf course from leaving the same and entering into the infield where the wire fence had been placed by defendant; that there was a hedge or shrubbery growing upon the inside of said turf or grass course which was about two feet in height, and that the same was naturally ineffectual to prevent horses running on the turf or grass course from leaving the same and entering the infield.

Plaintiffs further allege that it is a well known propensity, tendency or inclination of race horses to bolt from the track where there is no fence or other barrier sufficient to restrain them, and that such propensity, tendency or inclination of race horses was well known to defendant or the same would have been known to it had it exercised due care in that behalf; that because of the likelihood of said horses to bolt at the time and place aforesaid, it became the duty of defendant to have a fence or other barrier on the inside of the grass or turf track to prevent said horses from bolting or leaving the track, and that it was the duty of defendant not to allow any obstruction or barrier in the infield that would be dangerous to the horse or horses bolting from or leaving the turf or grass course; that not regarding its duty, the defendant negligently and carelessly and wrongfully allowed and directed the ten horses to run the race upon the track while there was no sufficient barrier or fence to keep War Minstrel from leaving or bolting from the track; and that defendant wrongfully and carelessly allowed and permitted the wire fence to remain on the infield from the 4th day of July to and including the 9th day of July, 1941; and that by reason of the negligence of defendant War Minstrel ran into and became entangled in the wire fence.

entangled in the wire fence.
of the negligence of defendant War Minister has into and became
to and including the 25th day of July, 1881; and that by reason
the wire fence to remain on the inside from the 4th day of July
and that defendant wrongfully and carelessly allowed and permitted
to keep Mr. Minister from leaving or bolting from the track;
race upon the track while there was no sufficient barrier or fence
and wrongfully allowed and directed the ten horses to run the
not regarding its duty, the defendant negligently and carelessly
horses bolting from or leaving the turf or grass course; that
or barrier in the inside that would be dangerous to the horse or
that it was the duty of defendant not to allow any obstruction
to prevent said horses from bolting or leaving the track, and
and place, it became the duty of defendant to have a
that because of the likelihood of said horses to bolt at the time
have been known to it had it exercised due care in that respect;
tion of race horses was well known to defendant at the time would
to restrain them, and that even provisionally, defendant or inclusion-
the track where there is no fence or other barrier sufficient
provisionally, defendant or inclusion of race horses to bolt from
thereafter further alleged that it is a well known

from leaving the race and occupying the infield.
effective to prevent horses running on the turf or grass course
about two feet in height, and that the same was not only in-
growing upon the inside of said turf or grass course which was
been placed on defendant; that there was a hedge or embankment
the same and entering into the infield from the wire fence; and
horses running upon the grass or turf course from leaving
its inside or infield had no barrier or fence to prevent
its agents or servants; that the grass on turf course on

Plaintiffs further allege that eight of the ten horses running in the Grassland Handicap were owned by persons other than the plaintiffs; that plaintiffs owned two of said horses in said race, one of which was War Minstrel; that plaintiffs had no control over the other eight horses and that while the race was being run the plaintiffs and their jockeys were in the exercise of due care for the safety of War Minstrel; that a rider of one of the other horses running in the race ran against and forced War Minstrel from the turf or grass track into the infield, which caused the rider of War Minstrel to become unseated and thrown from the horse and that War Minstrel, being riderless, ran into and against and attempted to jump over the wire fence which had been placed in the infield by defendant, and that from the injuries received it became necessary to kill the horse.

In paragraph 14 of the complaint, plaintiffs charged defendant with wilful, wanton and reckless conduct in placing and afterwards maintaining the wire fence in the infield while War Minstrel was running in the race upon the grass or turf course; and that by so doing the defendant exhibited disregard for safety of the property of plaintiffs and exhibited a conscious indifference to the probable consequences of its act. Damages are claimed in the sum of \$75,000.

The plaintiffs allege that while plaintiffs and their agents and servants were in the exercise of due care for the safety of their horse War Minstrel the horse was seriously injured through negligence of the defendant, and that the horse had to be killed. Plaintiffs claim that defendant was negligent in placing the woven wire fence across the infield of the track upon which the race in which War Minstrel was to run, for the purpose of making more room for an expected crowd of people at the track on July 4, 1941, and in leaving the wire fence there for five days

July 4, 1941, and in leaving the wire fence there for five days more room for an expected crowd of people at the track on the race in which Mr. Marshall was to run, for the purpose of making the woven wire fence across the infield of the track upon which he killed. Marshall's claim that a witness was negligent in placing through negligence of the witness, and that the horse was to safety of their horse was found. The horse was negligently injured agents and servants were in the custody of the law and the

after its purpose was served. They further claim that defendant was negligent in permitting the running of the race in which War Minstrel was injured, upon the turf course without a fence or other barrier to prevent horses from leaving the turf track and running into the infield and then running into the fence which defendant placed and left on the infield of the track.

Defendant contends that the hedge bordering the turf course and the woven wire fence stretched across the infield were mere passive agencies which furnished a condition making the injury of War Minstrel possible, and that this condition was not the proximate cause of the injury to the horse; that the prime cause of said injury was the act of a rider of another horse in the race in forcing plaintiffs' horse off of the turf course.

It was the duty of the defendant to keep the turf course free from obstruction so that the horses running upon it would have an opportunity to proceed thereon without any danger except that incidental to the usual running of a horserace. That duty did not extend beyond the turf course and other parts of the grounds provided by defendant in connection with a track upon which horses were run. Horses were not expected to run loose in the infield and no provision was made that a horse should be running in the infield. We can see no duty upon the defendant other than to keep its track and other parts of its grounds which horses were expected to use, in a reasonably safe condition so that the horses, which might be upon the track or some other part of the grounds which horses were expected to use, might be protected from injury.

If we assume that the maintenance of a two-foot shrubbery hedge, instead of a barrier which would prevent a horse engaged in running a race from getting into the infield, was negligence, or, if we assume that the maintenance of the

after its purpose was served. Any further delay in
 defendant was negligent in not taking the horses out of the track in
 which they were injured, and the fact that the horses were
 fence or other barrier to prevent horses from running into the track
 track and running into the infield and then running into the track
 which defendant failed to take any steps to prevent.
 Defendant contends that the horses were running in the
 course and no cover was provided for the horses and the infield was
 very positive evidence that the horses were running in the
 injury of the horses and the fact that the horses were running in the
 the horses were running in the track and the fact that the horses were
 cause of said injury was the fact that the horses were running in the
 in the race in favor of the horses and the fact that the horses were
 it was the duty of the defendant to take the horses out of the track
 course free from obstruction so that the horses running in the track
 would have an opportunity to pass the horses running in the track
 except that incidentally to the usual running of a horse race.
 That duty did not extend beyond the fact that the horses were running
 of the grounds provided by defendant in connection with the fact
 upon which horses were run. Horses were not expected to run
 loose in the infield and no provision was made for horses should
 be running in the infield. He can see no duty upon the defendant
 other than to keep the track and other parts of the grounds which
 horses were expected to use, in a reasonably safe condition so
 that the horses, which might be upon the track or some other part
 of the grounds which horses were expected to use, might be pro-
 tected from injury.

If we assume that the maintenance of a two-foot
 shrubbery hedge, instead of a barrier which would prevent a horse
 engaged in running a race from getting into the infield, was
 negligence, or, if we assume that the maintenance of the

temporary wire fence was negligence on the part of defendant, we must find that the construction and maintenance of the hedge and the wire fence in the infield only furnished conditions which made the injury possible, and were not the proximate cause of the injury to plaintiffs' horse. The immediate cause of the accident was the force or impetus given to War Minstrel by another horse in the race. This forced War Minstrel off of the turf course, through the hedge, and unseated his rider. If War Minstrel had not been forced off of the turf by another horse the accident would not have happened. If War Minstrel had not unseated his driver he would have remained under control so that the accident could have been averted. It was only by the immediate act of War Minstrel being forced off of the track, with the result that his driver was unseated, that the accident became at all possible. Even then, if War Minstrel had not attempted to run around in the infield the accident would not have happened.

In the case of Briske v. Village of Burnham, 379 Ill. 193, the plaintiff was a guest in an automobile of one Jakubcyk. The driver of the automobile drove it down a street that had been closed to the public traffic and ran into a barricade. The plaintiff contended that the Village was negligent in vacating the street and then leaving it, apparently a public thoroughfare, in a dangerous condition for travelers, without sufficient notice or warning at the point of vacation, that the street beyond was closed and dangerous and that, in the absence of such notice, the Village remained liable for defects in the street. The court held that the proximate cause of the injury was the negligence of the driver of the automobile, and that the presence of the barricade was a condition and not a proximate cause. At page 199, the court said:

[illegible]

"If a negligent act or omission does nothing more than furnish a condition making an injury possible, and such condition, by the subsequent independent act of a third person, causes an injury, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury (*Storen v. City of Chicago*, 373 Ill. 530; *Illinois Central Railroad Co. v. Oswald*, 338 Ill. 270; *Hartnett v. Boston Store of Chicago*, 265 Ill. 331; *Seith v. Commonwealth Electric Co.*, 241 Ill. 252.) An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury and itself becomes a direct and immediate cause of the injury. (*Illinois Central Railroad Co. v. Oswald*, supra; *Seith v. Commonwealth Electric Co.*, supra.) The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act. (*Illinois Central Railroad Co. v. Oswald*, supra; *Phillabaum v. Lake Erie and Western Railroad Co.*, 315 Ill. 131.) Manifestly, neither the fact that the vacated street was open to public travel nor the existence of the barricade did anything more than furnish a condition, and if either constituted negligence on the part of the respective defendants they were not acts concurrent with the negligence of Jakubcyk, the driver of the automobile in which plaintiff was a guest. In short, the intervening efficient cause of plaintiff's injuries was Jakubcyk's negligence."

In the case of *Storen v. City of Chicago*, 373 Ill. 530, the defendant was charged with negligence in failing to maintain a curbing between the street and a sidewalk, which negligence was the proximate cause of the injury to plaintiff, caused by a car parked along the street being struck by a moving automobile, and the parked car being driven by this force into the sidewalk and pinning plaintiff against a hydrant. In holding that the negligence of the driver of the car was the proximate cause of the injury and the lack of curbing was a passive condition which made the injury possible, the court said, at page 533:

"The issue presented for decision is whether the construction and maintenance by the defendant of the opening in the curb for use as a driveway constituted negligence, and, if so, whether such negligence was a contributing cause of plaintiff's injuries. Admittedly, the negligence of the person driving the automobile which struck *Filmanowicz*'s parked car was the immediate cause of plaintiff's injuries. The question remains, did defendant's negligence, if any, also render it accountable to plaintiff. In short, was the condition of the curb, in legal contemplation, a direct contributing cause of the injuries suffered by the plaintiff. Where two or more persons, under circumstances creating primary accountability, directly produce a single, indivisible injury by their concurrent negligence, they are jointly and severally liable, even though there is no common duty, common design or concerted action. (1 *Cooley on Torts* (4th ed.) p. 276ff, sec. 86; 62 *Corpus Juris*, (Torts,) sec. 45.) If,

however, a negligent act or omission does nothing more than furnish a condition making an injury possible, and such condition, by the subsequent act of a third person, causes an injury, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury. (*Seith v. Commonwealth Electric Co.* 241 Ill. 252.) Obviously, the depression in the curb in the present case did nothing more than furnish a condition and, if it constituted negligence on the part of defendant, was not an act concurrent with the negligence of the driver of the automobile which struck the parked car. The action of the driver, moreover, was not such as in the exercise of reasonable diligence the defendant would have anticipated, nor was the driver under the defendant's control."

It must be conceded that the wire fence was placed in the infield by the defendant and that the wire fence contributed to the injury to plaintiffs' horse, but we are satisfied that this particular condition was not a negligent condition which might reasonably have been anticipated as a contributing cause to the accident to War Minstrel. The infield was not to be used by horses, and the charge in this complaint is not one of bolting but is the act caused by a rider on another horse in the race. The defendant is not an insurer of the safety of horses engaged in a race at its track. The injury in this case was caused by a chain of circumstances which could not reasonably have been anticipated by defendant as a contributing cause to an accident such as happened to War Minstrel. It is well settled in this State that the condition which caused the injury must have been a negligent one which might reasonably have been anticipated as a contributing cause to the accident. (*Storen v. City of Chicago* 373 Ill. 530; *Carr v. Lee J. Behl Hotel Corp.* 321 Ill. App. 432.) In the case of *Merlo v. Public Service Co.*, 381 Ill. 300, the court said (pp. 316, 317):

however, a negligent act or omission was necessary to the
 which a condition existing in the vicinity, and that of the
 by the defendant, and that the condition was not created
 two acts and the condition was not created by the defendant.
 is not the proximate cause of the accident, and that the
 negligent act or omission was not the proximate cause of the
 condition, and that the condition was not created by the
 defendant, and that the condition was not created by the
 of the driver of the car, and that the condition was not
 The action of the driver, however, was not the proximate
 exercise of reasonable care, and that the condition was not
 anticipated, nor was the driver negligent in not anticipating it.

It is true that the condition was not created by the
 the condition was not created by the defendant, and that the
 to the injury to the plaintiff, and that the condition was
 this particular condition, and that the condition was not
 might reasonably have been anticipated by the defendant, and
 the accident to the plaintiff. The condition was not created
 horses, and the condition was not created by the defendant,
 but as the act caused by the defendant, and that the
 The defendant is not a tortfeasor, and that the condition was
 in a way as to the condition, and that the condition was
 chain of circumstances which caused the accident, and that
 anticipated a defendant, and that the condition was not
 such as happened to the plaintiff. It is not anticipated in
 that the condition which caused the injury was not
 negligent one who might reasonably have anticipated it, and
 contributing cause to the accident. (Lester v. City of Chicago,
 375 Ill. 550; 389 N.E. 2d 421, 422, 423.)
 In the case of Lester v. City of Chicago, 375 Ill. 550, 389
 court said (pp. 513, 517):

"This court in the case of Illinois Central Railroad Co., v. Oswald, 338 Ill. 270, has clearly announced the rule applicable in this case. It was there said that if the negligence charged does nothing more than furnish a condition by which the injury is made possible and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury where the subsequent act is an intervening efficient cause which breaks the causal connection between the original wrong and the injury, and itself becomes the proximate or immediate cause. The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act. (Briske v. Village of Burnham, 379 Ill. 193.)

For the reasons hereinabove given, we are constrained to hold that the amended complaint sets up no cause of action against the defendant and that the trial court was correct in so holding. Accordingly, the judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

BURKE, P.J., CONCURS,
KILEY, J., DISSENTING.

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Managing Agent of the property of defendant at 3920 Lake Shore Drive, Chicago, "pursuant and in accordance with the terms and provisions of said Plan of Reorganization and, as to compensation to be paid to party of the second part" (plaintiff).

The plaintiff acted as Managing Agent of the property of defendant until March 31, 1941, and on that date he was discharged by the defendant. From the date of the contract of employment until the date of plaintiff's discharge, plaintiff deducted monthly from the gross receipts from said property an amount equal to four per cent of the rental income as his compensation.

At the time of plaintiff's discharge there still remained of the five-year term specified in said contract, the period from April 1, 1941 to July 9, 1942. Because of plaintiff's discharge he rendered no service to defendant during said period. He waited until said period had passed, and instituted suit for an amount equal to four per cent of the gross rental of defendant's property for said period. This amounted to \$3782.41. Upon a trial before a jury, a verdict was rendered in favor of plaintiff for that amount.

The defendant made a written motion for judgment non obstante verdicto setting up that the written contract upon which the plaintiff based his suit was void for lack of mutuality of obligation and because of an absence of a term specifying the compensation to be paid the plaintiff. This motion was denied, and the court entered judgment on the verdict. Defendant appeals.

Construing the contract of employment and the pertinent provisions of the Plan of Reorganization which are referred to in the contract of employment, it can only be determined that the plaintiff was employed by the defendant for a period of five years as Managing Agent of its property with the provision for plaintiff's compensation to be "not to exceed 4% of the gross rental income derived" from the defendant's property.

Managing Agent of the property of defendant at 2320 Lake Shore Drive, Chicago, "pursuant and in accordance with the terms and provisions of said Plan of Reorganization and, as to compensation to be paid to party of the second part" (plaintiff).

The plaintiff acted as Managing Agent of the property of defendant until March 31, 1941, and on that date he was discharged by the defendant. From the date of the contract of employment until the date of plaintiff's discharge, plaintiff deducted monthly from the gross receipts from said property an amount equal to four per cent of the rental income as his compensation.

At the time of plaintiff's discharge there still remained in the five-year term specified in said contract, the period from April 1, 1941 to July 31, 1943. Because of plaintiff's discharge he rendered no service to defendant during said period. He claimed until said period had passed, and instituted suit for an amount equal to four per cent of the gross rental of defendant's property for said period. This amounted to \$3282.41. Upon a trial before jury, a verdict was rendered in favor of plaintiff for that amount.

The defendant made a written motion for judgment non obstante setting up that the written contract upon which the plaintiff based his suit was void for lack of mutuality of obligation and because of an absence of a term specifying the compensation to be paid to plaintiff. This motion was denied, and the court entered judgment in the verdict. Defendant appeals.

Concerning the contract of employment and the pertinent provisions of the Plan of Reorganization which are referred to in the contract of employment, it can only be determined that the plaintiff was employed by the defendant for a period of five years as Managing Agent of its property with the provision for plaintiff's compensation to be "not to exceed 4% of the gross rental income derived" from

the defendant's property.

Contracts of employment containing the words "not to exceed" as to amount of compensation and duration of time have been pronounced indefinite and uncertain by the courts. In the case of United Press v. New York Press, 164 N. Y. 406, 58 N. E. 527, a contract providing for payment for services in "a sum not exceeding three hundred dollars during each and every week that said news report is received" was held indefinite and uncertain as to amount of compensation, the court saying (p. 528): "It lacked support in one of its essential elements - - in the absence of the price to be paid. That was a defect which was radical in its nature, and which was beyond the reach of oral evidence to supply; for, if the intention of the parties, in so essential a particular, cannot be ascertained from the instrument, neither the court nor the jury will be allowed to make an agreement for them upon the subject. It is elementary in the law that, for the validity of a contract, the promise or the agreement of the parties to it must be certain and explicit, and that their full intention may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, parol proof cannot be resorted to."

In the case of Harper v. Hassard, 113 Mass. 187, the court construed a contract of employment which described the term of employment as "not exceeding three years" from the date of the agreement. In deciding that the agreement was indefinite as to term of employment the court said (p. 189): "The agreement of plaintiff is to serve the defendant 'during the term of not exceeding three years' that is to say, a term which cannot be more but may be less, than that time. The agreement of the defendants is to pay him a weekly compensation, not for any definite time, but only 'during said term' of three years or less * * *. There is no express agreement of the defendants to employ the plaintiff for three years, and no stipulation from which, in our judgment, such an agreement can be implied."

Contracts of employment containing the words "not to exceed" as to amount of compensation and duration of time have been pronounced indefinite and uncertain by the courts. In the case of United States v. New York Press, 104 U. S. 406, 25 L. Ed. 101, 7 Otto, 101, providing for payment for services in "a sum not to exceed \$100,000" the court held that the contract was indefinite and uncertain as to amount of compensation, and was held indefinite in the absence of the words "not to exceed" in the contract. The court said: "It is a well settled principle of law that a contract which is indefinite in its nature, and which is beyond the reach of oral evidence to supply, for, if the intention of the parties in so essentially a particular, cannot be ascertained from the instrument, neither the court nor the jury will be allowed to make an agreement for them on the subject. It is also settled in the law that, for the validity of a contract, the promise or the agreement of the parties to it must be certain and explicit, and that a verbal intention may be ascertained to a reasonable degree of certainty. Their agreement must be neither vague nor indefinite, and if it cannot be ascertained to, it cannot be resorted to."

In the case of Harper v. National Bk. of Ind., 107, the court construed a contract of employment which described the term of employment as "not exceeding three years" from the date of the agreement. In deciding that the agreement was indefinite as to term of employment the court said (p. 108): "The agreement of plaintiff to serve the defendant 'during the term of not exceeding three years' that is to say, a term which cannot be more but may be less, than that time. The agreement of the defendant is to pay him a weekly compensation, not for any definite time, but only 'during said term' of three years or less." There is no express agreement of the defendant to employ the plaintiff for three years, and no stipulation from which, in our judgment, such an agreement can be implied."

Other cases holding that similar language renders the agreement uncertain and indefinite are Campbell v. Jimenes, 27 N. Y. S. 351; Gains v. Reynolds Tobacco Co., 163 Ky. 716; Brooks v. Federal Surety Co., 24 F. (2d) 884.

The plaintiff not having rendered any services during the period after his discharge could not maintain a cause of action upon a quantum meruit, but could recover, if at all, only upon his written contract of employment. The written contract not being definite as to the amount of his compensation plaintiff could not recover upon the same.

The plaintiff offered evidence as to the reasonable value of the services of a managing agent in the city of Chicago for services similar to the services that plaintiff would have rendered if he had rendered services under the agreement. This evidence could not be substituted and read into the contract between the parties so that plaintiff could recover as and for a reasonable value of the services which he did not render to defendant. As shown by the quotation above from United Press v. New York Press, 164 N. Y. 406, and by the quotation hereinafter set forth from Joliet Bottling Co. v. Brewing Co., 254 Ill. 215, oral evidence could not supply the absence of the definite amount of compensation to be paid to plaintiff. The trial court erred in admitting expert evidence of the reasonable value of plaintiff's services which were never rendered to defendant.

The plaintiff claims that the plaintiff and the defendant placed a practical construction upon said written agreement by the defendant paying and the plaintiff accepting from the date of the agreement to the date of plaintiff's discharge an amount each month equal to four per cent of the gross rental income derived from the defendant's property. The plaintiff says that such practical

Other cases holding that similar language renders the agreement uncertain and indefinite are Hammond v. Zimmerman, 27 N. Y. 2d 351; Caine v. Reynolds Tobacco Co., 125 N.Y. 210; Brooks v. Federal Surety Co., 24 N.Y. 2d 384.

The plaintiff, not having rendered any services during the period after his discharge could not claim a quantum meruit upon a quantum meruit, but could recover, if at all, only upon the written contract of employment. The written contract was being definite as to the amount of his compensation plaintiff could not recover upon the same.

The plaintiff offered evidence as to the reasonable value of the services of a managing agent in the city of Chicago for services similar to the services rendered by plaintiff. This evidence was not admitted and was not introduced into the record between the parties so that plaintiff could recover as and for a reasonable value of the services which he did not render to defendant. As shown by the quotation above from United States v. New York, 24 N.Y. 405, and by the quotation hereinafter set forth from United Bottling Co. v. Levine Co., 254 Ill. 219, oral evidence could not supply the absence of the definite amount of compensation to be paid to plaintiff. The trial court erred in admitting expert evidence of the reasonable value of plaintiff's services which were never rendered to defendant.

The plaintiff claims that the plaintiff and the defendant entered a practical construction upon said written agreement by the defendant paying and the plaintiff accepting from the date of the agreement to the date of plaintiff's discharge an amount each month equal to four per cent of the gross rental income derived from the defendant's property. The plaintiff says that such practical

construction so placed on said employment contract interpreted the vague and indefinite term of the contract of employment, and made definite and certain the amount of plaintiff's compensation at four per cent of the gross rental income derived from the defendant's property, even though the written contract itself may be indefinite. In support of this proposition, the plaintiff cites Nolte v. Hudson Navigation Co., 16 F. (2d) 182; Doyle v. Teas, 4 Scam. 202; Whalen v. Stephens, 193 Ill. 121; Armstrong Paint Works v. Continental Can Co., 301 Ill. 102; Weger v. Robinson-Nash Motor Co., 340 Ill. 81. An examination of those cases shows that they are cases where the contract involved was ambiguous and had been interpreted by the parties to it. In such cases the rule is that courts will regard the interpretation placed upon the contract by the parties as the correct interpretation to be placed upon the contract.

But that rule has no application to a contract which is not ambiguous, but is indefinite in some necessary provision. In the case of Joliet Bottling Co. v. Brewing Co., 254 Ill. 215, the court held that an executory contract between a brewing company and a bottling company lacked mutuality because no definite obligation was incurred by the Bottling company, and with reference to the question of interpretation of the contract by the parties said (p. 219): "Appellant relies upon the rule that where a contract is ambiguous and has been interpreted by the parties to it, courts will regard the interpretation placed upon the contract by the parties themselves. This rule can have no application to a construction of the contract before us because it is not ambiguous, and the intention of the parties to it is not to be determined by evidence aliunde but by the language employed by the contract itself."

In the case of United Press Co. v. New York Press, 164 N. Y. 406, 58 N. E. 527, the same point of practical construction was made and overruled by the court, the court saying: "The

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property, even though the written contract itself may be indefinite.
In support of this proposition, the plaintiff cites Adler v. Hudson
Evolution Co., 10 N. E. (2d) 188; Boyle v. West, 4 Conn. 202; Thaler
Stephens, 193 Ill. 121; Armstrong Paint Works v. Continental Can Co.,
101 Ill. 102; West v. Robinson-Wash Motor Co., 240 Ill. 21. In
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In the case of United Press Co. v. New York Press, 184
N. Y. 408, 88 N. E. 527, the same point of practical construction
was made and overruled by the court, the court saying: "The

appellant claims that, inasmuch as the language of the contract bound the defendant to pay a sum 'not exceeding \$300.00 a week,' by paying that sum for a period of time, it had bound itself through a practical construction of the instrument; and it is also argued that the contract should be construed as one 'to recover the reasonable value of the news service for the unexpired term of the contract, less the costs of performance.' If this were a case where the contract of the parties was merely ambiguous in its terms, it might be permissible to explain them by evidence of their acts, and thus to show a practical construction; but the difficulty with this instrument lies deeper. It lacked support in one of its essential elements -- in the absence of a statement of the price to be paid."

In the case of Weston Paper Mfg. Co. v. Downing Box Co., 293 Fed. 725, the court held that a contract which left the price of goods to be fixed by the seller was void for indefiniteness. The court further held that, though the contract was void for indefiniteness, acceptance by the buyer of the price named for the first three months' deliveries would constitute a binding contract for such quantity, but not for future deliveries, the court saying (p. 728): "Under the authorities (Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696; Hoffman v. Maffioli, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427; Hopkins v. Racine Malleable & Wrought Iron Co., 137 Wis. 583, 119 N. W. 301; Thayer v. Burchard, 99 Mass. 508; Wickham & Burton Coal Co. v. Farmers' Lumber Co., 189 Iowa, 1183, 179 N. W. 417, 14 A. L. R. 1293) there can be no question but that the goods shipped under contracts void because of uncertainty as to price, yet accepted by the purchaser when delivered, must be paid for, and at the price determined by the standard named in the contract. Such part performance, however, does not validate the entire agreement."

In this case the contract is not ambiguous but is indefinite in one of its vital necessities, a definite amount of compensation to be paid by the defendant to the plaintiff. No evidence of a practical construction can be held to supply that failure to incorporate in the contract that essential provision. The contract must be construed solely from the language found in the contract. That language is too indefinite and uncertain to base a definite and certain agreement between the parties, and, as above set forth, the contract herein involved lacks mutuality.

An additional defense raised by the defendant was that plaintiff's fraudulent conduct caused waste of the defendant's assets with reference to monies expended for the defense of four mandamus suits involving the transfer of capital stock of the defendant and the issue of shares of stock of defendant to himself and Max Thorek, a fellow director, in connection with a tuckpointing job done for the defendant. The defendant contended upon the trial that the plaintiff was guilty of such fraudulent conduct as to justify his discharge. The same evidence was relied upon by the defendant in support of a counter-claim against the plaintiff for moneys which the defendant claims the plaintiff, while acting as president, director and manager of defendant, caused defendant to expend in defense of four mandamus suits made necessary by the wrongful refusal of the plaintiff to transfer stock of defendant corporation on its books and in defense of a suit to set aside the sale of treasury shares to plaintiff and his fellow officer, and director, Max Thorek.

Because of our holding with reference to the claim of plaintiff, it is not necessary to determine whether the actions of the plaintiff relative to his claimed fraudulent conduct, constituted legal grounds for his discharge. The evidence on this question, however, was pertinent on the counter-claim of the defendant.

In this case the contract is not ambiguous but is indefinite in one of its vital necessities, a definite amount of compensation to be paid by the defendant to the plaintiff. The evidence of a practical construction can be adduced by the failure to incorporate in the contract that essential provision. The contract must be construed strictly from the language found in the contract. That language is too indefinite and uncertain to have a definite and certain meaning. It is the duty of the court, as above set forth, the contract herein involved being null and void. An additional defense raised by the defendant was that

plaintiff's fraudulent conduct caused a loss of one thousand dollars with reference to which evidence was introduced in support of the mandamus writ involving the transfer of capital stock of the defendant and the issue of shares of stock of defendant to himself and Max Thork, a fellow director, in connection with a stock-selling job done for the defendant. The defendant is connected with the trial that the plaintiff was guilty of such fraudulent conduct as to justify his discharge. The same evidence was relied upon by the defendant in support of a counter-claim against the plaintiff for moneys which the defendant claims the plaintiff, while acting as president, director and manager of defendant, caused defendant to expend in defense of four mandamus writs also necessary by the wrongful refusal of the plaintiff to transfer stock of defendant corporation on its books and in defense of a suit to set aside the sale of treasury shares to plaintiff and his fellow officers, and director, Max Thork.

Because of our holding with reference to the claim of plaintiff, it is not necessary to determine whether the actions of the plaintiff relative to his claimed fraudulent conduct, constituted legal grounds for his discharge. The evidence on this question, however, was pertinent on the counter-claim of the defendant.

The jury rendered a verdict against the defendant on its counter-claim and the defendant requests this court to enter a judgment here for the amount which it is claimed is shown to have been defendant's damage. The court, however, is of the opinion that a judgment should not be entered in this court upon defendant's counter-claim, but that this cause should be reversed and remanded to the trial court for a new trial upon the question of defendant's counter-claim.

We are of the opinion as above set forth that the trial court erred in admitting the expert evidence of what plaintiff's services would have been worth if he had rendered them, and the admission of such evidence was prejudicial error so far as defendant's counter-claim was concerned. We are further of the opinion that the amount of damages claimed to be due by the defendant on its counter-claim cannot be so accurately determined by us so that a judgment should be entered here upon defendant's counter-claim; the plaintiff may have been justified in employing an attorney with reference to the first mandamus suit, or possibly the second; the plaintiff may have properly sought legal advice on the question of his refusal to transfer the stock and been advised that he should so refuse; the plaintiff may properly claim that the charges of the attorney he employed to give such advice were proper items of corporate expense; the defendant may have properly sought legal advice with reference to the suit instituted to cancel the four hundred shares of stock issued to plaintiff and Thorek. All of these matters and all of the actions of the plaintiff which the defendant claims were fraudulent with resulting waste of corporate assets and damage to the defendant involve a question of good faith and intent on the part of the plaintiff.

The jury rendered a verdict against the defendant on its

counter-claim and the defendant requests this court to enter a

judgment here for the amount which it is claimed is shown to have

been defendant's damage. The court, however, in its opinion

that a judgment should not be entered in this court upon defendant's

counter-claim, but that this cause should be reversed and remanded

to the trial court for a new trial upon the question of defendant's

counter-claim.

We are of the opinion as above set forth that the trial

court erred in admitting the expert evidence of the plaintiff's

services would have been worth at least the amount claimed, and the

admission of such evidence was prejudicial error so far as defendant's

counter-claim was concerned. We are further of the opinion that

the amount of damages claimed to be due by the defendant on its

counter-claim cannot be so accurately determined by us as that a

judgment should be entered here upon defendant's counter-claim; the

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plaintiff may have properly sought legal advice on the question of

his refusal to transfer the stock and been advised that he should so

refuse; the plaintiff may properly claim that the charges of the

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admitted.

the part of the plaintiff.

question, how-

admitted.

As the record now stands we feel that it would be beyond our privilege to enter a judgment for a certain definite amount against the plaintiff on defendant's counter-claim. We feel that justice between the parties requires that the plaintiff have every opportunity to defend against defendant's counter-claim, in a trial into which the question of his claimed compensation under the employment contract between the parties does not enter.

This court makes the specific finding that the employment contract between the plaintiff and the defendant is so uncertain and indefinite as to compensation that plaintiff cannot recover thereon. The judgment of the circuit court in favor of the plaintiff and against the defendant in the sum of \$3782.41 will be reversed and judgment entered here in favor of the defendant on plaintiff's claim against the defendant. The judgment of the circuit court against the defendant upon its counter-claim against the plaintiff is reversed and cause remanded for a new trial.

Judgment reversed and cause remanded with directions to enter judgment for defendant and against plaintiff on issues raised on original complaint, and for a new trial on the issues raised by the counter-claim and answer.

JUDGMENT REVERSED, AND REMANDED.

BURKE, P.J. AND KILEY, J. CONCUR.

As the record now stands we find that the plaintiff is entitled to a judgment in his favor.

Our privilege to enter a judgment in favor of the plaintiff is based upon the fact that the plaintiff has established a prima facie case against the defendant. The evidence is sufficient to show that the defendant has committed a wrong against the plaintiff and that the plaintiff is entitled to a judgment in his favor.

It is the duty of the court to render a judgment in favor of the plaintiff if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

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Contract between the plaintiff and the defendant is not enforceable. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

Indefinite as to compensation for the plaintiff's services. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

The judgment of the circuit court is reversed. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

Against the defendant in the sum of \$100.00. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

Judgment entered here in favor of the plaintiff on the ground that the defendant has committed a wrong against the plaintiff. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

Against the defendant. The judgment of the circuit court is reversed. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

The defendant upon its motion for a new trial is granted. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

And cause remanded for a new trial. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

Judgment reversed and cause remanded for a new trial. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

After judgment for defendant the plaintiff moved for a new trial. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

A original complaint, and for a new trial on the ground raised by the counter-claim and answer. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

TO THE HONORABLE THE COURT. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

WITNESSES MY HAND AND SEAL OF OFFICE. The court is not bound by the verdict of the jury if the evidence is sufficient to show that the defendant has committed a wrong against the plaintiff.

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3261A. 258

MARGARET McKENZIE, Administratrix
of the Estate of John McKenzie,
Deceased,

Appellee,

v.

THOMAS J. FRIEL and CHARLES C.
RENSHAW, as Trustees, etc., et al.,
doing business as CHICAGO SURFACE
LINES,

Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED OPINION OF THE COURT.

This action was brought by Margaret McKenzie, administratrix of the estate of John McKenzie, deceased, against Thomas J. Friel and Charles C. Renshaw, as Trustees, etc., et al., doing business as the Chicago Surface Lines, to recover for the pecuniary loss alleged to have been sustained by the widow and children of the decedent, who died on July 3, 1943 as the result of injuries he received on July 2, 1943, when he attempted to board a north bound Cottage Grove avenue street car at 37th street. The jury returned a verdict finding defendants guilty and assessing plaintiff's damages at \$10,000. Defendants' motions for judgment notwithstanding the verdict and for a new trial were overruled and judgment was entered in favor of plaintiff on the verdict. Defendants appeal.

Plaintiff's complaint alleged substantially that her intestate, John McKenzie, was standing at 37th and Cottage Grove avenue for the purpose of becoming a passenger on one of defendants' street cars and at about the place where they were accustomed to receive and discharge passengers; that when a north bound street car reached the place where the decedent was standing, the speed of the car was reduced until it was moving not much, if any, faster than a man could walk and apparently for the purpose of receiving him as a passenger;

that when the speed of the street car was so reduced, the decedent, while exercising due care and caution for his own safety, attempted to board the car in order to become a passenger thereon; that while he was in the act of boarding said car, but before he had fully and safely boarded same, defendants, by their servants and agents in charge of the street car, although they knew or by the exercise of due care could have known that McKenzie was in the act of boarding it, negligently and without warning increased the speed and started the car forward suddenly, and, as a result thereof, he was thrown violently from the street car to the ground and received the injuries which caused his death.

Defendants' theory as stated in their brief is that "on the morning in question a street car became disabled at or near 38th street causing a blockade or tie-up of street cars at that point; that when the disabled street car was removed from the track, the delayed street cars proceeded north bound and, in order to properly space the street cars on the street again, the first few of the delayed street cars, did not stop at 37th street but continued north to more distant stops so as to relieve the blockade and to properly space the street cars along the street; that by this operation the last of the delayed street cars would stop for passengers at 37th street, which was the first street north of the place of the blockade, without holding up any street cars behind it; that the street car which plaintiff's intestate attempted to board was about the third of the delayed street cars and that there was at least one street car closely following it; that because a number of people were standing close to the track and because of the danger of cross traffic, the motorman reduced the speed of the street car as it approached 37th street; that after the

that when the speed of the street car was so reduced, the decedent, while exercising due care and caution for his own safety, attempted to board the car in order to become a passenger thereon; that while he was in the act of boarding said car, but before he had fully and safely boarded same, defendants, by their servants and agents in charge of the street car, although they knew or by the exercise of due care could have known that decedent was in the act of boarding it, negligently and without warning increased the speed and started the car forward suddenly, and as a result thereof, he was thrown violently from the street car to the ground and received the injuries which caused his death.

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front end of the street car passed the people who were standing on the street and as soon as the motorman saw that the intersection was clear, he applied the power so as to proceed north on Cottage Grove avenue and that it was in these circumstances that plaintiff's intestate undertook to board the street car while it was in motion."

Plaintiff's intestate had been a machinery mover for 17 or 18 years prior to the accident involved herein. He was about 46 years old and married. He left surviving him a widow and four minor children. He was about six feet tall, in strong physical condition and his hearing and eyesight were good.

On the morning of July 2, 1943 the decedent left his home about 7 A. M. and went to the southeast corner of 37th street and Cottage Grove avenue, as he usually did, to take a north bound Cottage Grove avenue street car to his place of employment. He was waiting with 10 or 15 other people at the regular stopping place for north bound street cars, when the car in question arrived at about 7:15 A. M. These people were "strung out" toward the south from the south crosswalk of 37th street for a distance of approximately the length of a street car and they were standing about 3 feet east of the east rail of the north bound street car track. The decedent was standing about opposite where the rear end of the street car would be if the car stopped at its regular stopping place. Some of the Cottage Grove avenue street cars were front entrance cars and some were rear entrance cars. The street car involved in the accident was a rear entrance car. Its rear platform was open and was not equipped with doors that could be opened or closed. As the rear platform of the street car reached and was passing the

front end of the street car passed the building and were standing on the street and as soon as the motorist saw that the intersection was clear, he pulled the power as to proceed north on Cottage Grove Avenue and that it was in these circumstances that the accident occurred.

Witness's statement had been a preliminary report for 14 or 15 years prior to the accident in 1914. He was about 40 years old and married. He had a family consisting of a widow and four minor children. He was a strong, healthy man, in strong physical condition at the time and eyesight were good.

On the morning of July 4, 1914, the defendant left his home about 7:30 a.m. and went to the southeast corner of 17th street and Cottage Grove Avenue, as he usually did, to take a north bound Cottage Grove Avenue street car to his place of employment. He was waiting with 1 or 2 other people at the regular stopping place for north bound street cars, when the car in question arrived at about 7:45 a.m. These people were "standing out" toward the south from the northbound

of 17th street for a distance of approximately the length of a street car and they were standing about 1 foot east of the east rail of the north bound street car track. The decedent was standing about opposite where the car and the street car would be if the car stopped at its regular stopping place. Some of the Cottage Grove Avenue street cars were front entrance cars and some were rear entrance cars. The street car involved in the accident was a rear entrance car. Its rear platform was open and was not equipped with doors that could be opened or closed. As the rear platform of the street car reached and was passing the

decedent he took hold of the handrail with one hand and put his right foot on the step of the car. While he was in that position in the act of boarding the street car, its speed was suddenly accelerated and he was thrown violently to the pavement.

Only two witnesses testified as to the actual occurrence, Willie Roy Ficklen testifying on plaintiff's behalf and Henry Peels testifying on defendants' behalf.

Ficklen testified substantially that he had a newspaper stand at the southeast corner of 37th street and Cottage Grove avenue; that he was at and about his stand selling newspapers on the morning of July 2, 1943; that it was a "dry and fair" morning; that "it seemed as though the street cars had been tied up *** there was quite a few people congregated on the corner, waiting on the street car"; that when he first saw the street car which was involved in the accident, it "was approaching the people there *** going very slow *** he [the motorman] almost came to a stop, and all of a sudden he started off again, and I heard some woman scream"; that the decedent "reached to get the street car, because the street car was to a stop mostly, and all of a sudden the street car started up" and the man was thrown or fell off; that just as the man had his hand on the handrail of the rear platform and his foot on the step of the car, "the street car started up faster" and he was thrown to the pavement; that in his opinion the street car was traveling at a speed of about "4 to 6 miles an hour" before its speed was suddenly accelerated; that he then saw the street car "stopped" in the intersection - almost at the north side of 37th street; that when the decedent attempted to board the street car, he was standing "in front" of its rear platform; and that when he [Ficklen] first saw the

decedent he took hold of the handle with one hand and put his right foot on the step of the car. While he was in that position in the act of boarding the street car, its speed was suddenly accelerated and he was thrown violently to the pavement.

Only two witnesses testified as to the actual occurrence, William Boylston testifying on behalf of the decedent and Henry Peela testifying on behalf of the street car company. Boylston testified that he had a newspaper stand at the southeast corner of 37th and Cottage Grove Avenue; that he was at the stand selling newspapers on the morning of July 1, 1911; that it was a hot and sunny morning; that it seemed a strange thing that there had been tied up on the street a few people who gathered on the corner, waiting on the street car; that when he first saw the street car which was involved in the accident, it was approaching the people there and going very slow and he [the motorist] almost came to a stop, and all of a sudden he started off again, and I heard some woman scream; that the decedent "reached to get the street car, because the street car was to a stop mostly, and all of a sudden the street car started up" and the man was thrown or fell off; that just as the man had his hand on the handle of the rear platform and his foot on the step of the car, the street car started up "faster" and he was thrown to the pavement; that in his opinion the street car was traveling at a speed of about 4 to 6 miles an hour before its speed was suddenly accelerated; that he then saw the street car "stopped" in the intersection almost at the north side of 37th street; that when the decedent attempted to board the street car, he was standing "in front" of its rear platform; and that when he [Boylston] first saw the

street car, its front end was passing the point where the decedent was standing and when the decedent attempted to board the street car at its rear entrance, the front end of the street car was about even with the south side of the south crosswalk of 37th street.

Henry Peels testified that he was among those waiting at 37th street for a north bound Cottage Grove avenue street car on the morning in question; that he was over near the news stand and behind the people who were standing a few feet east of the street car track; and that he saw that the north bound street cars were in a "tie-up" at 38th street and that "there was about 6 or 7 passed without stopping, because they was lined up." The following then occurred on his direct examination: "Q. When one of the cars came by there, did you notice a man try to board the street car? A. Sure, I was standing right out there while he was boarding the street car. Q. When he tried to board the street car, was the street car moving? A. Yes, moving along. Q. And what part of the street car did he make a grab for? A. The back end. Q. And what part of the street car did he touch? A. He caught hold of the rod and put his right foot on the running board. That is what he caught onto."

Peels testified on cross-examination that he saw the street car in question when it left 38th street; that he "couldn't tell how fast it run" but he knew "it was going fast" when the decedent "went to catch it, but I couldn't tell you how fast it was"; that the street car slowed down "just a little bit" before it got to 37th street; that when the street car reached 37th street, "it was pretty slow, but I don't know how many miles it was"; that "there was no bell rung by the motorman"; that the decedent was standing

II hung by the motorman"; that the decedent was standing

"closest to the rear end of the street car"; that when the street car reached the intersection it "put on speed"; and that McKenzie was "flung" 10 feet by the car.

Harold Johnson testified that he was the motorman of the north bound Cottage Grove avenue street car which was involved in the accident; that when his car arrived at 38th street, there were three street cars standing on the north bound track ahead of him, the first of which was "a disabled car"; that when the disabled car was removed, the other two cars ahead of him proceeded northward and he followed shortly thereafter; that his car was delayed at 38th street approximately 4 minutes; that as he proceeded northward between 38th street and 37th street he saw approximately 10 or 12 people standing south of 37th street "in the regular boarding position" for north bound street cars; that he saw that the street car immediately ahead of him did not stop either at 37th street or 36th street; that as he approached 37th street he made up his mind not to stop there but to stop at 36th street and let the car behind him pick up the people waiting at 37th street; that "customarily whenever there is a delay in the service like that, it is proper to space the street out and get the cars *** on their scheduled space again. If the first car or any one car stops and tries to pick up all passengers, the delay will not be cleared up and there will be more of a delay as you go along the right of way"; that as he approached the people standing at the regular stopping place south of 37th street he slowed his car down "to about 8 or 10 miles an hour" and "rang the gong and made sure there was no one standing in front of the car or crossing the street"; that he "rang the gong" to warn the people who were standing out in the street of the approach of his car and that "they stepped back a little bit"; that when these people stepped back and he

"closest to the rear end of the street car"; that when the street car reached the intersection it "put on speed"; and that McKenzie was "lying" in front of the car.

Harold Johnson testified that he was the motorman of the north bound Cottage Grove Avenue street car which was involved in the accident; that when his car arrived at 36th street, there were three street cars standing on the north bound track ahead of him, the first of which was a disabled car; that when the disabled car was removed, the other two cars ahead of him proceeded northward and he followed shortly thereafter; that his car was last at 37th street and northwardly 4 minutes; that as he proceeded northward between 36th street and 37th street he saw a crowd of people standing south of 37th street in the regular boarding position for north bound street cars; that he saw that the street car immediately ahead of him did not stop either at 37th street or 36th street; that as he approached 37th street he made up his mind not to stop there but to stop at 36th street and let the car behind him pick up the people waiting at 37th street; that "customarily whenever there is a delay in the service like that, it is proper to space the street out and get the cars *** on their scheduled space again. If the first car or any one car stops and tries to pick up all passengers, the delay will not be cleared up and there will be more of a delay as you go along the right of way"; that as he approached the people standing at the regular stopping place south of 37th street he slowed his car down "to about 5 or 10 miles an hour" and "rang the gong and made sure there was no one standing in front of the car or crossing the street"; that he "rang the gong" to warn the people who were standing out in the street of the approach of his car and that "they stepped back a little bit"; that when these people stepped back and he

saw that there was no traffic on 37th street, he continued northward across 37th street, accelerating his speed "slightly"; that when he stopped his car after receiving the emergency bell from his conductor its "rear end was about even with the north crosswalk of 37th street"; and that after he left 38th street the highest speed his car attained was about 15 or 16 miles an hour, when he was in the middle of the block between 38th street and 37th street.

The testimony of Thomas Hynes the conductor was to the same effect as that of the motorman concerning the tie-up of the north bound cars at 38th street, the extent of the delay and the number of cars affected by the blockade. He further testified that shortly after his car left 38th street, he saw a number of people standing at the regular stopping place south of 37th street waiting for a north bound car; that as his car "neared 37th street" he heard the motorman "ring his bell" and that signal indicated to him that "he was not going to stop at that intersection"; that as his car approached 37th street "it possibly slowed down to approximately 8 or 10 miles an hour to cross the intersection"; that he was standing on the rear platform in his "regular position" for collecting fares, with his back to the body of the street car and facing southward "as the car approached the intersection"; that he "only heard the thud of a man against the back end of the car"; that he then "looked toward the outside of the car and saw this man fall to the street"; that he immediately "pulled the emergency bell for a stop" and the car stopped with its rear end "approximately a car length north of 37th street"; that he did not at any time see the man "on the platform or on the step" before he saw him strike the back end of the car and fall to the street; and that immediately after he saw the man strike the

saw that there was no traffic on 37th Street, he continued
northward across 37th Street, crossing into 38th Street
"slightly"; that when he stopped in the "trap" and the
the emergency bell from the emergency bell "trap" and
about even with the north crosswalk of 37th Street; and
that after he left 37th Street the car stopped in the
stationed was about 11 or 12 miles away, when he was in
the middle of the block between 37th Street and 38th Street.
The testimony of these witnesses is that the car was to the
same effect as that of the witness concerning the timing of
the north bound car at 37th Street, the car was in the
and the number of cars stopped at the station. The witness
testified that shortly after the car left 37th Street, he
saw a number of people standing at the station waiting place
south of 37th Street waiting for a north bound car; that as
his car "near 37th Street" he heard the policeman telling him
"bell" and that signal indicated to him that the car was not
to stop at that intersection; and as the car approached 37th
Street "it possibly slowed to a stop or possibly 2 or 3 miles
an hour to cross the intersection"; that he was standing on the
rear platform in his "regular position" for collecting fares,
with his back to the body of the street car and facing southward
"as the car approached the intersection; that he only heard
the third of a man against the back end of the car"; that he
then "looked toward the outside of the car and saw this man
fall to the street"; that he immediately pulled the emergency
bell for a stop" and the car stopped with its rear end "approxi-
mately a car length north of 37th Street"; that he did not at
any time see the man "on the platform or on the steps" before
he saw him strike the back end of the car and fall to the
street; and that immediately after he saw the man strike the

rear end of the platform the street car increased its speed.

Defendants presented in evidence Section 81 of the Uniform Traffic Code of the City of Chicago, which provides as follows:

"It shall be unlawful for any person to board or alight from a street car or vehicle while said street car or vehicle is in motion."

Defendants first contend that as a matter of law their liability was not shown by any facts and circumstances disclosed by the evidence. In other words they claim that all reasonable minds must agree that plaintiff failed to show actionable negligence on their part and that the decedent was in the exercise of ordinary care for his own safety at and immediately prior to the time of the accident. There is no merit in this contention, since there can be no question but that the testimony of plaintiff's witness Ficklen and of defendants' witness Peels tends to show that while attempting to board the car the decedent was injured in the manner alleged in the complaint and by reason of defendants negligence as therein alleged.

In Klinck v. Chicago City Ry. Co., 262 Ill. 280, it was held that recovery could be had under a factual situation practically identical with that presented here. There Klinck was attempting to board a north bound Cottage Grove avenue street car at a customary stopping place after the defendant through its servants had reduced the speed of its car until it was moving not much, if any, faster than a man could walk and, while he was in the act of boarding the car but before he had fully and safely boarded same, the speed of the street car was suddenly increased without warning and he was thrown to the ground and injured. In that case the court said at pp. 284, 298:

rear end of the platform the street car increased its speed.

Defendants presented in evidence section 11 of the Uniform Traffic Code of the City of Chicago, which provides as follows:

"It shall be unlawful for any person to board or alight from a street car or vehicle while said street car or vehicle is in motion."

Defendants first contend that as a matter of law their liability was not shown by any facts and circumstances disclosed by the evidence. In other words they claim that all reasonable minds must agree that defendant failed to show actionable negligence on their part and that the decedent was in the exercise of ordinary care for his own safety at and immediately prior to the time of the accident. There is no merit in this contention, since there can be no question but that the testimony of defendant's witness tends to show that while attempting to board the car the decedent was injured in the manner alleged in the complaint and by reason of defendant's negligence as therein alleged.

In Klink v. Chicago City Ry. Co., 202 Ill. 280, it was held that recovery could be had under a factual situation practically identical with that presented here. There Klink was attempting to board a north bound Chicago Grove Avenue street car at a customary stopping place after the defendant through its servants had reduced the speed of the car until it was moving not much, if any, faster than a man could walk and, while he was in the act of boarding the car but before he had fully and safely boarded same, the speed of the street car was suddenly increased without warning and he was thrown to the ground and injured. In that case the court said at

"As **Klinck** was standing at a place where plaintiff in error was accustomed to receive and discharge passengers for the purpose of boarding the car, and as the speed of the car was reduced as it approached the place where he was standing, apparently for the purpose of receiving and discharging passengers, the relation of passenger and carrier existed between him and plaintiff in error when he attempted to board the car and was injured ***. *** While it is necessary to prove either an express or implied contract of carriage between the carrier and the alleged passenger, yet the act of the carrier in stopping a street car, or in bringing it almost to a stop, at a place where it is accustomed to receive and discharge passengers, is an implied invitation to persons intending to take passage thereon at that place to board the car, and the act of any such person attempting to board the car is an acceptance of the implied invitation and creates the relation of carrier and passenger. It is the duty of those in charge of the car to know whether or not the implied invitation has been accepted, and the carrier cannot escape liability by showing that its employees in charge of the car did not know that the person who has accepted the implied invitation intended to board the car."

In Little v. Peoria Railway Co., 215 Ill. App. 385, it was claimed that the plaintiff was injured while in the act of boarding a slowly moving street car at its usual stopping place. There the court said at pp. 388, 389:

"Appellant also contends that if the car was in motion when she started to get upon it, she cannot recover. *** It is the settled law of this State that it is not negligence per se for a person to get upon a street car when it is in motion, and that the question whether, under the particular circumstances of the case, the act of the person so getting upon a street car in motion is negligence in fact, contributing to the resulting injury, is for the jury. Cicero & P. St. Ry. Co. v. Meixner, 160 Ill. 320; North Chicago St. Ry. Co. v. Wiswell, 168 Ill. 613; South Chicago City Ry. Co. v. Dufresne, 200 Ill. 456; Chicago Union Traction Co. v. Lundahl, 215 Ill. 289; Kelly v. Chicago City Ry. Co., 283 Ill. 640. *** The courts recognize that there may be a tacit invitation to get upon a street car."

In Kern v. United Rys. Co. of St. Louis, 214 Mo. App. 232 (259 S. W. 821), in discussing the law applicable to a similar factual situation, the court said at p. 242:

"In the present case defendant's car in response to decedent's signal, was slowed down until it had come almost, if not quite, to a dead stop, with the doors open and the step lowered, at the precise place where defendant was accustomed to receive and discharge passengers. Thereupon decedent attempted to board the car. He placed one foot upon the lowered step and reached for the handrail, and while thus in the act of boarding the car and while his body

was poised on one foot and before he had obtained hold on the handrail, the car went forward with a sudden jerk or acceleration of speed and proceeded on its way, and the decedent was thrown from the step under the trailer and was dragged to his death. To say that a public carrier may thus, with its car and trailer, set a trap for an intending passenger and spring it at the opportune instant and throw him under the trailer to his death, and not be required to answer in damages therefor, would be to announce a doctrine no court could tolerate, much less approve."

It is next contended that the verdict ^{was} against the manifest weight of the evidence.

Defendants stress the custom of their motormen in spacing the street cars after a blockade so as to reestablish their schedules and argue in effect that the testimony of the motorman and conductor as to the manner in which the street car in question was operated, considered in the light of such custom, shows conclusively that decedent was guilty of contributory negligence in attempting to board the moving street car and that they were not guilty of the negligence charged in the complaint. However, this custom does not and could not have the conclusive significance which defendants seem to attribute to it. The only possible purpose that could be served by the evidence as to said custom was to attempt to account for the failure of the motorman to stop his car at 37th street and to fortify the testimony of the motorman and conductor as to the manner in which the car was operated as it approached, reached and passed the point where the decedent was waiting at the regular stopping place at 37th street. Certainly it cannot be said that if the evidence shows that the decedent, while in the exercise of due care, received his fatal injuries as the result of the negligent operation of the particular car, plaintiff would be precluded from recovery by reason of such custom. Furthermore, the motorman testified that he would not have violated this custom or any

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testified that he would not have violated this custom or any cover by reason of such custom. Furthermore, the motorist of the particular car, plaintiff would be precluded from recovery his fatal injuries as the result of the negligent operation the decedent, while in the exercise of due care, received. Certainly it cannot be said that if the evidence shows that was waiting at the regular stopping place at 37th street, it approached, halted and passed the point where the decedent conductor as to the manner in which the car was operated as 37th street and so testify the testimony of the motorist and account for the failure of the motorist to stop his car as served by the evidence as to said custom was to attempt to attribute to it. The only possible excuse that could be have the conclusive significance which defendants seem to in the complaint. However, defendant does not and could not say and that they were not guilty of the negligence charged customary negligence in being able to avoid the moving vehicle custom, shows conclusively that defendant was guilty of conduct in question was established, concluded in the light of such motorist and conductor as to the manner in which the street appearing the street car, with a distance no less than establishing defendant's stress the fact of their motorist in

regulation of defendants if he did stop his car at 37th street, particularly after two of the delayed cars had already passed up the intending passengers waiting at that street. The evidence of primary concern herein is that bearing upon the conduct of the decedent and the manner in which the particular street car was operated at and prior to the time of McKenzie's injury and the only real conflict in the evidence, as we view it, was as to the speed at which the car was moving at and immediately prior to the time the decedent attempted to board it.

If, when the car reached the place where McKenzie was standing, its speed had been reduced apparently for the purpose of receiving him as a passenger and it was then moving no faster than a man could walk, under the law he had a right to board it and the law is settled in this state that when a passenger attempts to board a street car under such circumstances and is injured by reason of a sudden increase in its speed without warning and before he has fully and safely boarded the car, the street car company will be required to respond in damages for such injury.

As heretofore shown, Ficklen testified that as the front end of the car passed McKenzie and as its rear entrance reached him the street car was "going very slow," it "almost came to a stop" and it was traveling at a speed of about "4 to 6 miles an hour." Peels, who was defendants' only occurrence witness, corroborated Ficklen by his testimony that when the front end of the car reached 37th street, "it was going pretty slow." Opposed to this testimony is that of the motorman and conductor that the speed of the car was not reduced lower than 8 or 10 miles an hour as it approached and passed the people waiting at 37th street. This conflict in the evidence as to

regulation of defendants it is not stop his car at 37th street, particularly after two of the defendants had already passed up the intended passenger waiting to get on the car. The evidence of primary concern is that the defendant was not in front of the defendant and the manner in which the defendant's street car was operated at that time to the view of the witness and the only real conflict in the view of the witness was as to the speed at which the car was moving at and immediately prior to the time the defendant attempted to board it.

12. When the car reached the place where the witness was standing, the speed of the car was such that the witness was of receiving him as a passenger and it was then moving no faster than a man could walk, and the law is not a right to board it and the law is not in this state that when a passenger attempts to board a street car under such circumstances and is injured by reason of a sudden increase in the speed without warning and before he has fully and safely boarded the car, the street car company will be required to respond in damages for such injury.

As heretofore shown, Tichen testified that as the front end of the car passed the witness and as the witness reached him the street car was "going very slow," it almost came to a stop" and it was traveling at a speed of about 4 to 6 miles an hour." Tichen, who was defendant's only witness, corroborated Tichen by his testimony that when the front end of the car reached 37th street, "it was going pretty slow." Opposed to this testimony is that of the motorman and conductor that the speed of the car was not reduced lower than 8 or 10 miles an hour as it approached and passed the people waiting at 37th street. This conflict in the evidence as to

the speed of the car presented a question of fact for the jury to determine and by its verdict the jury resolved that question and all other material questions of fact in favor of plaintiff.

Defendants assert that "if it were the fact that the street car involved in the accident, as it approached and undertook to pass the people standing at 37th street and the intersection there, was being operated in a manner appreciably different than the preceding street cars were operated as they approached and passed, so as to lead Mr. McKenzie, as a reasonably prudent man, to believe that this particular street car was going to stop there or that he was being invited to board the same as a passenger, it was incumbent upon plaintiff to make such proof." This argument is entirely lacking in merit and plaintiff had no such burden. It would impose an unwarranted burden upon plaintiff to require her to prove that the car in question was operated in an appreciably different manner than the two preceding cars, since those cars or the manner in which they were operated had nothing to do with the accident.

Defendants seek to make a point of the fact that the car was actually passing the stopping place when McKenzie attempted to board it at its rear entrance. It is a matter of common knowledge and experience that a street car is not always stopped exactly at its regular stopping place. If this car had almost come to a stop or slowed down to a walking pace when its rear platform reached the point where the decedent was standing, as Ficklen testified, McKenzie had the right to assume that it would come to a stop within a very short distance and the fact that the motorman might not bring his car to a dead stop until its front end projected somewhat over the crosswalk could not affect the rights of a person

the speed of the car in terms of a question of fact for the jury to determine and in the absence of any evidence that would tend to establish the contrary, the jury is authorized to find in favor of the defendant.

and date of birth were in fact never furnished

the accident.

Defendants seek to make a point of "the fact that the

over the crosswalk could not affect the rights of a person
his car to a dead stop until its front end projected somewhat
short distance and the fact that the motorman might not bring
right to assume that it would come to a stop within a very
cedent was standing, as Tichien testified, Ekenside had the
pace when its rear platform reached the point where the de-
this car had almost come to a stop or slowed down to a walking
always stopped exactly at its regular stopping place. It
of common knowledge and experience that a street car is not
attempted to board it at its rear entrance. It is a matter
car was actually passing the stopping place at N. W. Ekenside

properly attempting to board it at its rear entrance.

It is urged that it is significant that neither the decedent nor anyone else waiting at 37th street showed any intention to attempt to board the car as it was passing until McKenzie "made a grab for it just as the rear end was passing and the motorman applied the power." There is no force to this argument. The very presence of these people waiting at a regular stopping place was sufficient indication of their intention to board the first car that stopped to pick them up. The only place they could board this particular car was at its rear entrance and it is idle to urge that as the motormen passed them they showed no intention of boarding the car. It is also suggested that it is significant that no one else attempted to board the car. No one else had an opportunity to board it, because when McKenzie who was closest to the rear entrance did attempt to board the car, he was thrown off by its sudden increase in speed. Defendants' argument that nobody signalled the car to stop does not merit serious consideration. The presence of 10 or 15 people at a regular stopping place was in itself all the signal necessary. As has been seen, defendants presented in evidence an ordinance of the City of Chicago declaring it to be unlawful for any person to board or alight from a street car while same is in motion. While it is the rule that the violation of a safety ordinance is prima facie evidence of negligence, "it is the settled law of this State," as stated in Little v. Peoria Railway Co., supra, "that it is not negligence per se for a person to get upon a street car when it is in motion, and that the question whether, under the particular circumstances of the case, the act of the person so getting upon a street car in motion is negligence in fact, contributing to the resulting injury, is for the jury."

Whether under the evidence in the instant case the decedent

was free from contributory negligence and the defendants were guilty of the negligence charged in the complaint were purely questions of fact that were properly submitted to the jury for its determination and in our opinion there was ample evidence to justify the verdict.

Defendants contend that the trial court erred in refusing to give the following instruction:

"When circumstances and delays in the operation of a street car service make the stopping of a car to take on passengers at a street intersection impractical, there is no duty or law requiring the street car to stop."

This instruction was properly refused because it attempted to inject an irrelevant and fictitious issue into the case. The gravamen of plaintiff's complaint and the theory upon which the case was tried was not that defendants were negligent because of the failure of their street car to stop at 37th street but that they were negligent in suddenly accelerating its speed while McKenzie was in the act of boarding it, after they had extended to him an implied invitation to board the car by slowing down to not more than a walking pace apparently for the purpose of taking on passengers.

Defendants also complain of the refusal of the trial court to give their submitted instruction No. 32. This instruction was properly refused because certain portions of it did not correctly state the law applicable to this case. That part of the instruction which did correctly state the law was covered by another instruction submitted by defendants, which was given.

For the reasons indicated herein the judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend and Scanlan, JJ., concur.

was free from contributory negligence and the defendants were
guilty of the negligence charged in the complaint and only
questions of fact that were properly submitted to the jury
for its determination and in its opinion it was
evidence to justify the verdict.

Defendants contend that the trial court erred in re-

fraining to give the following instruction:

"When driver advances and begins to pass a vehicle on a
street car service while the stopping of the car on
passengers at a street intersection is a duty, it is
no duty on law to passing the street car to stop."

This instruction was properly refused because it was

to inject an irrelevant and immaterial issue into the case. The
gravamen of plaintiff's complaint and the theory upon which the
case was tried was not that defendant was negligent because
of the failure of their street car to stop at the street but
that they were negligent in not only continuing its speed
while it was in the act of passing it, but also in
extending to him an implied invitation to board the car by
allowing down to not more than a walking pace especially for
the purpose of taking on passengers.

Defendants also complain of the refusal of the trial
court to give their proposed instruction No. 25. This in-
struction was properly refused because certain portions of it
did not correctly state the law applicable to this case. That
part of the instruction which did correctly state the law was
covered by another instruction submitted by defendants, which
was given.

For the reasons indicated herein the judgment of the

Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend and Seaman, J.L., County.

42492

WILLIAM S. HENNESSEY,

Appellant,

v.

KENNETH RAFFERTY, GEORGE R. BENSON,
ANNA M. BENSON, CHICAGO TITLE AND TRUST
COMPANY, as Trustee under Trust Deed made
by Kathryn O'Malley, dated July 22,
1925, recorded in the Recorder's Office
of Cook County, Illinois, as Doc.
No. 8987053, and as Trustee under Trust
Deed made by Kenneth Rafferty, dated
November 30, 1928, recorded in the
Recorder's Office of Cook County,
Illinois, as Doc. No. 10226599, VICTOR
C. CARLSON, CHARLOTTE CARLSON, KATHRYN
O'MALLEY and UNKNOWN OWNERS,
Appellees.

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APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, William S. Hennessey, appeals from a decree of the Superior court foreclosing two trust deeds, wherein the chancellor adjudicated the amount due him and directed the sale of the premises, but found and adjudicated that defendants George R. Benson and his wife Anna were not personally liable for any deficiency resulting from the sale.

From more than 700 pages of testimony adduced upon the hearing before the master in chancery to whom the cause was generally referred, it appears that plaintiff owned five lots located at Clark and Howard streets in Evanston, carrying title in the name of his dummy Kathryn O'Malley. The property was encumbered by two mortgages of \$20,000 each, signed by Kathryn O'Malley, both of them owned and held by plaintiff who was at the time the real owner of the property. Victor C. Carlson, a builder, had developed a large section of the neighborhood in which the property was located, and in pursuance of a plan to erect other buildings, sought an option for the purchase of the property through one Phelan, a broker, with whom plaintiff had listed the property for

sale. By means of negotiations carried on through his manager Elwood L. Williams, Carlson obtained an option in favor of Alfred E. Williston, a young lawyer associated with Carlson's attorneys. The option, dated August 11, 1928, gave Williston the privilege of acquiring the property subject to the two existing mortgages of \$20,000 each, and the payment of \$125,000 cash. The mortgages were dated August 23, 1922 and July 22, 1925, respectively, and were due by extension August 23, 1929 and July 22, 1930, respectively. Subsequently Carlson secured a modification of the option reducing the cash requirements by providing for the execution and delivery by Williston of a purchase-money mortgage of \$60,000 and cash amounting to \$65,000 against a deed subject to \$40,000 in mortgages. Williston exercised the option at the direction of Carlson, who deposited \$5500 as the requisite earnest money, and caused Williston to execute an acceptance of the option on October 15, 1928. By the terms of the option Kathryn O'Malley was required to deliver a preliminary report of title of the Chicago Title and Trust Company within 20 days after the earnest money was deposited, and if no defects appeared, Williston was required to pay the balance of the purchase price, \$59,500, in cash, and to execute and deliver the purchase-money mortgage for \$60,000. The foregoing transactions preceded any involvement of George R. Benson, who was not approached in the transaction by anyone until the late summer or fall of 1928. There is a conflict in the evidence with respect to the time Benson was first approached. Williams gave his recollection of the time as 10 or 15 days after August 11, the date of the original option, whereas Benson stated positively that he was in Colorado from

August 18 to the middle of September and did not meet Williams until after the 15th of October. Carlson lacked the cash with which to complete the transaction, and Williams therefore attempted to induce Benson to lend Carlson the necessary \$65,000. Carlson produced financial statements showing him to be worth around \$7,000,000. He offered to pay 10 per cent commission and 6 per cent interest for the use of the money that Benson was asked to advance, and offered to put up 500 shares of Orrington Hotel stock then worth approximately \$150 per share, and to assign several hundred thousand dollars of life insurance as security for the loan of \$65,000.

Benson discussed the proposal with his attorney, who counseled against taking Carlson's obligation, which required the payment of 16 per cent in interest and commission, because of usury, and suggested instead that Carlson convey the property when his deal was completed, to Benson, and sign a contract personally obligating himself to pay the amount in question to Benson, and to receive from Benson a conveyance of the property when payment was made. To secure his undertaking Carlson deposited 500 shares of Orrington Hotel stock and \$200,000 of life insurance.

November 28, 1928 Williston assigned his option to Kenneth Rafferty, and two days thereafter Carlson, Hennessey, Penwell and Benson entered into an escrow agreement at the Chicago Title and Trust Company with Rafferty, which provided, among other things, that Kathryn O'Malley should deposit a deed to Rafferty subject to \$40,000 in mortgages, against \$59,281.33 and Rafferty's \$60,000 second mortgage. It also provided that Rafferty was to deposit a deed to Benson, subject to \$100,000 in mortgages, and Benson was to deposit \$62,500 to be used when the Chicago Title and Trust Company

August 18 to the title of the same and the same was
until after the 15th of October. The same was then
which to complete the transaction, and which was therefore
estimated to amount to \$100,000.00. The same was then
\$65,000.00. Carlson provided financial statement showing him
to be worth about \$2,000,000.00. He offered to pay 10 per cent
commission and a per cent interest for the use of the same.
That Benson was asked to deliver, and offered to pay 10
shares of Granger Hotel stock which was worth approximately 11 1/2
per share, and to assign several other shares of stock in
life insurance. Benson delivered to Carlson the same, and
Benson delivered to Carlson the same, and Benson delivered to Carlson
conveyed against being released from the same, which was then
the payment of 10 per cent in interest and commission, and was
of same, and suggested that the same be paid out of the
property. It was then suggested to Carlson, and it was
contract was made, and Carlson was to pay the same in
question to Benson, and to receive from Benson a conveyance
of the property when paid and was then to receive the same
taking Carlson delivered to Benson a conveyance to the stock
and \$200,000 of life insurance.

November 25, 1933 Carlson assigned the same to
Kenneth Raftery, and the same was then assigned to Benson,
Benson and Benson entered into an agency agreement at the
Chicago Title and Trust Company and Raftery, which provided
among other things, that Raftery should deposit a
bond to Raftery subject to \$40,000 in mortgages, against
\$50,000.00 and Raftery's \$6,000 second mortgage. It was
provided that Raftery was to deposit a bond to Benson, sub-
ject to \$100,000 in mortgages, and Benson was to deposit
\$65,000 to be used when the Chicago Title and Trust Company

was ready to guarantee title to him.

Benson and others in the pool who made up the amount of \$62,500, which was the figure finally agreed upon as the amount of the loan, made the sum available to Benjamin S. Mesirow, Benson's attorney, and on December 5, 1928 that amount was deposited by him in escrow with the Chicago Title and Trust Company, under the complete escrow agreement of November 30, 1928 between Carlson, Penwell, ^{Benson} and Hennessey. When the money was deposited, Mesirow signed the escrow agreement on behalf of Benson. The provisions of the escrow were subsequently carried out, as agreed, and Benson emerged from the transaction with the title, subject to \$100,000, received the Orrington Hotel stock and insurance policies from Carlson, and held these securities as collateral security for Carlson's direct obligation to pay Benson the amount of his advancement and his profit under the terms of their agreement.

Subsequently Carlson went into bankruptcy and scheduled his contract with Benson. The Orrington Hotel was foreclosed and Benson received nothing on the 500 shares of stock held by him as collateral. The insurance policies lapsed for nonpayment of premiums and Benson received \$439, which was the cash value of one of the policies. Carlson never performed under his contract with Benson, and when the second mortgage of \$60,000 became due and after foreclosure thereon was instituted, Benson paid \$25,000 on account of the principal, executed extension agreements under which the balance of \$35,000 and also the two \$20,000 mortgages would mature January 15, 1933, subject to the payment of interest in the interim. The extension agreements contained no

assumption clause or any undertaking to pay the principal. Benson paid all the interest coupons as they matured.

The plaintiff, Hennessey, sold one of the \$20,000 mortgages to his brother-in-law, Peter J. Werwecke, and advanced the money with which Werwecke foreclosed the mortgage to which Hennessey and the maker, Kathryn O'Malley, became parties defendant. That proceeding resulted in a finding of personal liability of the maker, Kathryn O'Malley, but not of Benson. Hennessey acquired the master's certificate of sale resulting from the foreclosure as collateral security for money he had advanced for the foreclosure. Werwecke died and Hennessey became one of the executors of his will and inventoried the master's certificate subject to the agreement under which he, Hennessey, was to receive certain monies out of the sale of the property covered by the certificate.

It appears that prior to January 15, 1930 Hennessey had pledged with the Sheridan Trust and Savings Bank, as collateral for several loans, the two mortgages involved in this proceeding, as well as other securities. In 1935 he compromised his liability to the bank, which had gone into receivership, by turning over to the receiver thereof, the two mortgages in question, and obtained absolution from his liabilities to the receiver. Nothing further was done with the two mortgages until September 12, 1939, when Hennessey, purporting to act for Josephine Werwecke, his sister, made an offer to the receiver of the bank to purchase the \$20,000 mortgage and the \$35,000 second mortgage for \$2,500. That offer was accepted. In his proposal to the receiver no claim or disclosure was made that Benson was personally liable for the amount of the mortgages. Later, on November 27, 1939, Hennessey wrote to the deputy receiver of the bank requesting an explanation of

assumption either as to the principal.
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The plaintiff, Hennessey, sold one of the \$25,000 mort-
gages to his brother-in-law, Peter J. Hennessey, and advanced
the money with which Hennessey purchased the mortgage to which
Hennessey and the other, William J. Hennessey, became parties
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liability of the estate, Peter Hennessey, but not of Henson.
Hennessey acquired the estate's certificate of sale resulting
from the foreclosure as collateral security for money he had
advanced for the foreclosure. Hennessey died and Hennessey
became one of the executors of his will and inventoried the
estate's certificate of sale to the agreement under which he,
Hennessey, was to receive certain amounts out of the sale of
the property covered by the certificate.
It appears that prior to January 12, 1933 Hennessey had
pledged with the Northern Trust and Savings Bank, as collateral
for several loans, the two mortgages involved in this proceed-
ing, as well as other securities. In 1932 he compromised his
liability to the bank, which had gone into receivership, by
turning over to the receiver thereof, the two mortgages in
question, and obtained exoneration from his liabilities to the
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\$25,000 second mortgage for \$2,500. That offer was accepted.
In his proposal to the receiver no claim or disclosure was
made that Henson was personally liable for the amount of the
mortgages. Later, on November 27, 1933, Hennessey wrote to
the deputy receiver of the bank requesting an explanation of

the transaction whereby he was released from liability, and stated that "the only paper which had any value was the six (6) shares of stock in the Howard Avenue Trust & Savings Bank, with stock power attached." Hennessey now claims to be the owner of the mortgages and brought these foreclosure proceedings thereon three months after the entry of an order granting leave to the receiver to make the sale, and he seeks to charge Benson with personal liability on the two mortgages which he acquired from the receiver and which had matured January 15, 1933.

Among the evidence introduced before the master were documents pertaining to the purchase by Rafferty through the escrow, and a sale by O'Malley of the property in question to Rafferty under the terms of the escrow, which provides that Benson would deposit \$62,500, to be used when the Chicago Title and Trust Company was ready to guarantee title to him, subject to mortgages of record and a \$60,000 second mortgage signed by Rafferty. In neither the O'Malley nor the Rafferty deed does the grantee assume and agree to pay the mortgages; nor is any liability assumed or imposed on Benson by the extension agreement signed by him January 15, 1930. It clearly appears from the evidence of Benson, Mesirov and Williams that the transaction between Carlson and Benson was a loan, and no effort was made to disprove that fact. Plaintiff seeks, however, to change Benson's position as a lender of money to that of a purchaser from O'Malley, and thus to impose on Benson obligations which were not his and to which he was a stranger. The question presented is whether the transaction constitutes a liability as to Benson.

The law is well settled in this state that a deed to real estate made contemporaneously with a contract of repurchase may be shown to be a conveyance intended as a mortgage.

the transaction whereby he was released from liability, and stated that "the only paper which was of value was the six (6) shares of stock in the United States Trust Savings Bank, with stock power attached." He stated that he was to be the owner of the mortgage and that the mortgage was to be assigned to the receiver three months after the date of the order granting leave to the receiver to make the sale, and he was to charge Benson with personal liability on the two mortgages which he acquired from the receiver and which he obtained January 15, 1935.

Among the exhibits introduced before the master were documents pertaining to the purchase by Benson through the receiver, and a sale by O'Leary of the property in question to O'Leary under the terms of the order, which provides that Benson would deposit \$50,000 to be used when the Chicago Title and Trust Company was ready to guarantee title to him, subject to mortgages of record and a \$50,000 second mortgage signed by O'Leary. In neither the order nor the authority given does the trustee name and agree to pay the mortgages; nor is any liability assumed or imposed on Benson by the extension agreement signed by him January 15, 1935. It clearly appears from the evidence of Benson, O'Leary and Williams that the transaction between Benson and Benson was a loan, and no effort was made to disprove that fact. O'Leary still seeks, however, to change Benson's position as a lender of money to that of a purchaser from O'Leary, and thus to impose on Benson obligations which were not his and to which he was a stranger. The question presented is whether the transaction constitutes a liability as to Benson.

The law is well settled in this state that a deed to real estate made contemporaneously with a contract of mortgage may be shown to be a conveyance intended as a mortgage.

That doctrine was enunciated in the early case of Miller v. Thomas, 14 Ill. 428, and followed in the recent case of Illinois Trust Company v. Bibb, 328 Ill. 252, in which the court held that "where there is a conveyance by deed and a condition of defeasance in a collateral paper, any doubt whether the transaction is a mortgage will be resolved in favor of its character as a mortgage."

It is also the settled rule in this state that the assumption of existing mortgages by a grantee in a deed will not be presumed. A deed made "subject to" a mortgage does not alone render the grantee liable; there must be language of clear import that the grantee assumes the debt, it being generally held that the facts and intention are of controlling importance. In the case at bar the original option did not provide for an assumption and the supplement imposed no such obligation. The master found that there was no intention to hold Rafferty, let alone Benson who, the plaintiff says, was unknown to him, personally liable. In Wayne International Building and Loan Association v. Beckner, 191 Ind. 664, which was cited with approval in Buchsbaum v. Halper, 265 Ill. App. 226, the court said: "Obviously, the mere fact that the preliminary contract of sale provided that the grantee should 'assume' the mortgage, while the deed of conveyance evidencing the consummated contract recited only that the conveyance was 'subject to' the mortgage, would not prove that the grantee really had assumed and agreed to pay the mortgage. The execution of the deed of conveyance merged all previous negotiations with relation to what should be sold and conveyed. *** The conveyance of certain described lands 'subject to' a certain mortgage was merely the conveyance of an equity in those lands."

Plaintiff relies on Bride v. Stormer, 368 Ill. 524, as

that doctrine was established in the early case of *Illinois v. Thomas*, 14 Ill. 409, and followed in the later case of

Illinois Trust & Loan Co. v. State, 100 Ill. 571, in which the court held that "where there is a mortgage by deed and a

condition of defeasance in a deed of conveyance, the mortgage is not a mortgage, but a deed of conveyance, and the condition of defeasance is a condition of the deed of conveyance.

Whether the condition is a condition of the deed of conveyance or a condition of the mortgage is a question of fact, and the court in *Illinois Trust & Loan Co. v. State*, 100 Ill. 571, held that it was a condition of the deed of conveyance.

It is also the settled rule in this State that the

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not alone render the parties liable, there must be language

of clear import that the parties intended to be bound by the mortgage.

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obligation. The court found that there was no intention to

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supporting his contention that where real estate is purchased with the funds of one person and title is taken in the name of another, title will then be held by the party taking it, in trust, for the party furnishing the consideration. In that proceeding Stormer was an employee of the Denhart Bank for many years. In 1919 one Harland owned certain land and obtained a mortgage loan thereon from the bank of \$9,000. The loan was expressed in two notes, for \$5,000 and \$4,000 respectively, which the bank in turn sold to customers. Four years later the bank, through its trustee, foreclosed upon the mortgage, and after sale a master's deed was issued to Stormer in 1925. Stormer testified that he knew nothing about the title being placed in his name at that time. The bank paid the two notes of \$5,000 and \$4,000, respectively, to its customers. Subsequently, Stormer having become aware that he sold the title, at the request of the bank executed a trust deed and mortgage notes for \$12,000. These notes were sold by the bank to its customers and the bank, alone, received and retained the money. A controversy arose between the receiver and three of the stockholders as to who were the real parties in interest in making the loan. The Supreme court held that "the bank got and retained the money paid to it for notes, and, in equity, it is bound to pay whatever remains unpaid thereon after the sale of the mortgaged land" and held that there was unquestionably a resulting trust created the instant Stormer received title to the land, "and since the proof is that the bank's money was used in payment when Henry Denhart surrendered the certificate of indebtedness and receipted the master, it, and not the individual stockholders, was the person beneficially interested." However, in the more recent case of Naas v. Peters, 388 Ill. 505, the Supreme court in commenting on the Stormer case pointed out that "Stormer set up, in his own

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Storner case pointed out that "Storner set up, in his own

behalf, a resulting trust and proved the same before the master," and held that the bank was bound to pay under the common counts for money had and received, on the theory that it, having sold the notes to a confiding public, could not be permitted to receive and retain money without being held accountable for it.

In this proceeding plaintiff lays considerable stress on the contract between Carlson and Benson, arguing that because it is in the form of a purchase and sale agreement, rather than in the form of a third mortgage for \$62,500, Benson adopted and ratified the contract and became the equitable assignee against his will or the intention of any of the parties for and in place of Rafferty. However, the primary question still remains whether Benson lent the money to Carlson, and in determining this question, the substance and intent takes precedence over the form. The master found and the decree provides that Benson had not by deed or otherwise assumed or agreed to pay the mortgages, that there was no agreement, express or implied, on Benson's part to do so, that the extension agreement executed by Benson contained no language which could reasonably be construed to show any express or implied agreement on his part to pay the mortgage, and that there was no evidence of any intention on the part of Hennessey to hold Benson liable for the payment of any part of the mortgages until the filing of this suit; and the record supports these conclusions, it being apparent that Carlson and Benson chose a deed and contract as the evidence of the loan and security, instead of a mortgage, in order to avoid the cost and delay of foreclosing a third mortgage representing little value and security, and also because it would have been difficult to provide in a third mortgage that

Carlson pledge his Orrington Hotel stock and insurance policies. Judging the transaction as a whole, Benson's deed was in the nature of a mortgage. His title did not give him, at any time, the usual rights and incidents of ownership. He had to hold the property until he could demand his money from Carlson, if the latter did not voluntarily pay it at the expiration of three years; and not until there was a default could he resort to the land or any of the other securities. This indicates an intent to create a loan relationship, and under the authorities, it should be given such effect.

In an exhaustive brief of 73 pages plaintiff raises and discusses various theories and propositions, but on oral argument it was conceded that the only question involved was whether Benson should be personally liable for any deficiency that might result from the sale, and upon a careful consideration of this question and for the reasons indicated, we are of opinion that the master and court properly held adversely to plaintiff. The decree of the Superior court is therefore affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

Carlson pleads his obligation to the public and the
policy. Judging the transaction as a whole, it seems
good was in the nature of a sacrifice, and still did not
give him, at any time, the least right or interest of
ownership. He had to hold the property until it could
demand his money from Carlson, in the event it was
voluntarily paid it at the expense of the public; and
not until there was a default could he recover of the bank
or any of the other concerned. With little or no interest
to create a loan relationship, and with the bank and the
it should be given such effect.

In an exhaustive report of the House Committee on
and discussed various the case and proceedings, and on
and agreement it was found that the only action in-
volved was whether Carlson should be held liable for
any delinquency that might occur in the future, and upon
a careful consideration of this question and for the
reasons indicated, we are of opinion that the matter
and some properly held adversely to Carlson. The
decree of the Superior Court is therefore affirmed.

Sullivan, J., and Seabury, J., concur.

42833

DR. ARNOLD SCHLEIFER,
Appellant,

v.

DEPARTMENT OF REGISTRATION
AND EDUCATION OF THE STATE
OF ILLINOIS, and others,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

32 1A.259²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The petitioner, Dr. Arnold Schleifer, brought an action in mandamus to compel Frank G. Thompson as director, and Philip M. Harman as superintendent, of the Department of Registration and Education of Illinois, to grant him access to the examination of candidates for licenses to practise medicine in all its branches. Pursuant to a hearing the court entered an order denying the petition and this appeal followed.

Relator's petition alleged that he was a resident of Illinois, 28 years of age, a person of good moral character; that on June 1, 1942 he completed a twelve-month internship in the Alexian Brothers Hospital in Chicago; that he had made a declaration of intention to become a citizen of the United States October 9, 1941 and received a certificate of declaration which he was ready to produce in open court; that he had the preliminary and professional education required by the Medical Practice Act of this state (Ill. Rev. Stat. 1943, ch. 91, sec. 5b), having graduated from the medical school of the University of Vienna in Vienna, Austria, which in the judgment of the Department of Registration and Education was reputable and in good standing on March 4, 1938, when he received the degree of doctor of universal medicine, and continued so to be during 1939,

NORTH BRANCH CIRCUIT COURT,

COOK COUNTY,

DR. ARNOLD SCHLESIER,
Appellant,

v.

DEPARTMENT OF REGISTRATION
AND EDUCATION OF THE STATE
OF ILLINOIS, and others,
Appellees.

MR. JUSTICE THOMAS DELIVERED THE OPINION OF THE COURT.

The petitioner, Dr. Arnold Schlesier, brought an action in mandamus to compel Frank G. Thompson as director, and Philip H. Harman as superintendent, of the Department of Registration and Education of Illinois, to grant him access to the examination of candidates for licenses to practice medicine in all its branches. Pursuant to a hearing the court entered an order denying the petition and this appeal followed.

Petitioner's petition alleged that he was a resident of Illinois, 28 years of age, a person of good moral character; that on June 1, 1942 he completed a twelve-month internship in the Alexian Brothers Hospital in Chicago; that he had made a declaration of intention to become a citizen of the United States October 9, 1941 and received a certificate of declaration which he was ready to produce in open court; that he had the preliminary and professional education required by the Medical Practice Act of this state (Ill. Rev. Stat. 1943, ch. 91, sec. 5b), having graduated from the medical school of the University of Vienna in Vienna, Austria, which in the judgment of the Department of Registration and Education was reputable and in good standing on March 4, 1938, when he received the degree of doctor of universal medicine, and continued so to be during 1939,

1940 and until February 21, 1941, at which time the department passed a resolution, effective that same date, suspending recognition of all medical schools, except those in the United States and Canada, until such date as the suspended schools should ask for reinstatement and submit to a personal investigation; that the University of Vienna, at the time of petitioner's entrance therein and likewise at the time of his graduation therefrom, required as a prerequisite to admission thereto a two-year course of instruction in a college of liberal arts or its equivalent; that petitioner submitted to the aforesaid university, and again tenders as evidence of his two-year course of such instruction, the graduation certificate received by him June 25, 1932 from Real-gymnasium of Protestant (Reformed) Faith of Miskolc, Hungary; that he attended ten full courses or semesters (five years) of medical lectures in the treatment of human ailments at the medical school of the University of Vienna, each year's instruction consisting of not less than nine months; that he began his medical course on October 1, 1932 and finished his studies about March 4, 1938, more than 40 months having elapsed from the time of his enrollment to the completion of his medical studies; that the courses of instruction in preliminary and medical studies sufficiently complied with the requirements of the Illinois Medical Practice Act and are satisfactory to the department, and that in fact the department had admitted to examination a classmate of petitioner who likewise received his medical degree from the University of Vienna on March 4, 1938, being the same day on which petitioner graduated from the medical school; that the department admits the University of Vienna medical school was reputable and in good standing March 4, 1938, when petitioner graduated and received his

1940 and until February 11, 1941, at which time the Department passed a resolution, effective from that date, suspending recognition of all medical schools, except those in the United States and Canada, until such time as the suspended schools should ask for reinstatement and submit to a personal investigation; that the University of Vienna, at the time of petitioner's entrance therein and likewise at the time of his graduation therefrom, required as a prerequisite to admission thereto a two-year course of instruction in a college of liberal arts or its equivalent; that petitioner submitted to the University of Vienna, and again thereafter, a diploma of his two-year course of such instruction, the graduation certificate received by him June 10, 1936, from the University of Protestant (Reformed) Faith of Munich, Germany; that he attended ten full courses or semesters (five years) of medical lectures in the treatment of human ailments at the medical school of the University of Vienna, each year's instruction consisting of not less than nine months; that he began his medical course on October 1, 1932 and finished his studies about March 4, 1936, more than 40 months having elapsed from the time of his enrollment to the completion of his medical studies; that the course of instruction in preliminary and medical studies sufficiently complied with the requirements of the Illinois Medical Practice Act and are satisfactory to the department, and that in fact the department had admitted to examination a classmate of petitioner who likewise received his medical degree from the University of Vienna on March 4, 1938, being the same day on which petitioner graduated from the medical school; that the department admits the University of Vienna medical school was reputable and in good standing March 4, 1938, when petitioner graduated and received his

degree, and continued to be so during all of 1939 and 1940 and up to February 21, 1941, long after petitioner had completed his education in that institution; that the American Medical Association still found, as of December 21, 1942 (the date the petition was filed), said school to be reputable and in good standing; that although he has met all the requirements of the act and of the department, nevertheless the superintendent refuses to admit him to an examination on the ground that graduates of medical colleges in continental Europe after July 1, 1936 are not eligible for licensure in Illinois at the present time under the rule passed February 21, 1941 and amended June 2, 1942; that the foregoing rules and regulations are unreasonable and arbitrary, and that since he has exhausted all legal means available to be admitted to the examination, the writ of mandamus ought to be awarded to him.

The respondents' answer admitted substantially all the material allegations of the petition, denying only that the University of Vienna was a reputable school and in good standing on March 4, 1933, and during the period of 1939-1940 and up to February 21, 1941, in the judgment of the department, when the foregoing rules and regulations were enacted, and they aver that it was within the power of the department, as provided in the act, to adopt the rules, and contend that the rules were fair and reasonable.

Respondents concede that the courts may review rules of the department to determine whether they are fair, reasonable and impartial. In the recent case of People v. Frank G. Thompson et al., 325 Ill. App. 95, we had occasion to review the decisions so holding, and they need not be repeated here. Petitioner's principal contention is that the rule discrediting

European schools was **intrinsically** unreasonable, even apart from its retrospective aspect.

Respondents take the position that as the war went on, "the social disintegration which accompanies the advance of fascism had appeared in Central Europe and attacked its cultural institutions long before the commencement of actual hostilities in 1939," and that by reason thereof the department set as the effective date for the new rule July 1, 1936, upon the theory that it was deprived of the power to investigate the school after war had commenced. While it may be conceded that after Germany had seized Austria, proper investigation would be impossible, there is nothing in the record to indicate full means of investigation were impossible prior to March 1938. Petitioner graduated March 4, 1938, and until that time the situation in Austria did not preclude or prevent an investigation of the University of Vienna. The department having recognized that university as reputable and in good standing March 4, 1938, it would seem to us to be an arbitrary exercise of power to suspend, four years later, recognition of an institution which had theretofore been generally accepted by the department as a school in good standing.

Petitioner's testimony was the only evidence adduced upon the hearing. He testified that he had attended the University of Vienna from October 1932 to 1938; that it was a recognized school of learning not only in his native country but was also fully recognized as a grade A school in the United States, approved by the American Medical Association; that at the time of his graduation there had been no change whatever in the school, the professors, the curriculum and the system were exactly the same as they had been for some

European schools was "intrinsically unreasonable, even apart from its retrogressive aspect."

Respondents take the position that on the one hand, the "the social dislocation which necessarily arises from the change of

teaching had appeared in Central Europe and elsewhere the cultural institutions long before the commencement of actual hostilities in 1914," and that the reason for the delay in setting up the effective date for the new rules July 1, 1914, upon the theory that it was a question of the power to investigate

the school after war had been declared. While it may be contended that after Germany had entered Austria, proper investigation

would be impossible, there is nothing in the record to indicate full means of investigation were impossible prior to March

1914. Petitioner submitted March 4, 1914, and until that time the situation in Austria did not preclude or prevent an investigation of the University of Vienna. The Department having

recognized that Austria was at war and in poor standing March 4, 1914, it would seem to us to be an arbitrary exercise of power to suspend, four years later, recognition of an institution which had theretofore been generally accepted by the

Department as a school in good standing.

Petitioner's testimony was the only evidence adduced upon the hearing. The petition was not attended the University of Vienna from October 1914 to 1915; and it was

a recognized school of learning not only in his native country but was also fully recognized as a grade school in the United States, approved by the American Medical Association;

that at the time of his graduation there had been no change whatever in the school, the professors, the curriculum and the system were exactly the same as they had been for some

20 or 25 years; that Germany did not seize Austria until after his graduation and after he had received his diploma; that one of the students who graduated from the University of Vienna on the same day as petitioner was admitted to the examination in 1940 and is at present a licensed physician in the State of Illinois; that at the time of petitioner's application to the department for admission to the examination he submitted his credentials, work book and other records, which the committee examined; and that the only reason for the refusal of the department to grant him access to the examination was the rule heretofore set forth.

Under the circumstances it would appear that in order to become licensed to practise medicine in this state, petitioner would have to repeat an entire medical course of four years in a school recognized by the department because of the rules and regulations promulgated. It seems to us that, under the existing circumstances, this renders the rules unreasonable and arbitrary, and for the reasons indicated we are of opinion that the writ of mandamus should have been granted. The order denying the petition is therefore reversed and the cause remanded with instructions to issue the writ as prayed.

ORDER REVERSED AND CAUSE
REMANDED WITH INSTRUCTIONS.

Sullivan, P. J., and Scanlan, J., concur.

20 or 25 years; that during the time that he was in the United States after his graduation and after he received his education that one of the students who graduated from the University of Wisconsin on the same day as petitioner was admitted to the examination in 1941 and is at present a licensed physician in the State of Illinois; that at the time of petitioner's application to the Department for admission to the examination he submitted his application, and he and other students, which the committee on which he is the only person for the removal of the Department to grant admission to the examination was the rule heretofore and forth.

Under the heretofore rule in Illinois, petitioner in order to become licensed to practice medicine in this State, petitioner would have to repeat an entire medical course of four years in a school recognized by the Department because of the rules and regulations promulgated. It seems to me that, under the existing circumstances, this renders the rule unreasonable and arbitrary, and for the reasons indicated as one of opinion that the writ of mandamus should have been granted. The order denying the petition is therefore reversed and the case remanded with instructions to issue the writ as prayed.

ORDER OF THE COURT
IN THE MATTER OF THE PETITION OF
JAMES H. SULLIVAN, JR.

Sullivan, J. H., and others, vs. Board of Medical Examiners.

43193

IN THE MATTER OF THE
ESTATE OF NICHOLAS KEISER,
DECEASED.

)
) APPEAL FROM CIRCUIT COURT,
) COOK COUNTY.

32 LA. 260

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Nicholas Keiser died intestate in November 1936, leaving him surviving his six sons and daughters, Nicholas, Jr., John Joseph and George Keiser, Susan Madsler, Barbara Salefsky and Virginia Cieszynski. Following his death no immediate application was made for letters of administration. March 3, 1938, one of his sons, George Keiser, died intestate, leaving him surviving Bessie Keiser, his widow, and five minor daughters aged 6 to 16. George had a safety deposit box in the Continental Illinois National Bank of Chicago which upon his death was found to contain \$2,293 in cash, five \$1,000 Chicago, Milwaukee, St. Paul and Pacific Railway bonds dated February 2, 1925, a \$1,000 Kentucky Utilities Company first mortgage gold bond dated February 1, 1926, a certificate for 12 shares capital stock of Commonwealth Edison Company dated October 13, 1937, a certificate for 20 shares common stock of Atchison, Topeka & Santa Fe Railway Company dated August 4, 1928, a certificate for 10 shares common stock of Atchison, Topeka & Santa Fe Railway Company dated March 4, 1932, and a participation certificate for 5 trust shares of the Randolph Hotel Company dated January 7, 1937, all registered in the name of George Keiser.

March 5, 1938, two days after George Keiser's death, his brother, John Joseph Keiser, with the consent of the other heirs of his father, applied to the Probate court for letters of administration of the estate of Nicholas Keiser, and was accordingly appointed administrator. Subsequently, March 11, 1938, the

APPEAL FROM CIRCUIT COURT,
JACKSON COUNTY.

IN THE MATTER OF THE
ESTATE OF NICHOLAS KEISER,
DECEASED.

32-1-1-200

MR. JUSTICE T. H. BELL, JR., CLERK OF THE COURT.

Nicholas Keiser died intestate in November 1936, leaving his surviving his son and daughter, Nicholas, Jr., John Joseph and George Keiser, Susan Keiser, Barbara Keiser and Virginia Chesapeake. Following his death his immediate application was made for letters of administration. March 5, 1938, one of his sons, George Keiser, died intestate, leaving his surviving Bessie Keiser, his widow, and five minor daughters aged 6 to 16. George had a safety deposit box in the Commercial Illinois National Bank of Chicago which upon his death was found to contain \$2,293 in cash, five \$1,000 Chicago, Milwaukee, St. Paul and Pacific Railway bonds dated February 2, 1925, a \$1,000 Kentucky Utilities Company first mortgage gold bond dated February 1, 1926, a certificate for 18 shares capital stock of Commonwealth Edison Company dated October 13, 1937, a certificate for 20 shares common stock of Johnson, Topeka & Santa Fe Railway Company dated August 4, 1929, a certificate for 10 shares common stock of Johnson, Topeka & Santa Fe Railway Company dated March 4, 1938, and a participation certificate for 5 trust shares of the Randolph Hotel Company dated January 7, 1937, all registered in the name of George Keiser. March 5, 1938, two days after George Keiser's death, his brother, John Joseph Keiser, with the consent of the other heirs of his father, applied to the Probate Court for letters of administration of the estate of Nicholas Keiser, and was accordingly appointed administrator. Subsequently, March 11, 1938, the

Probate court appointed Bessie Keiser as administratrix of the estate of George Keiser, deceased. It appears that the brothers and sisters of George Keiser, acting on information that their brother George had taken possession of the assets of his father's estate and misappropriated funds and property belonging thereto, called a conference of all the children and heirs of Nicholas Keiser, which was held in the forepart of March 1938, shortly after George's death. David A. Riskind, an attorney representing the estate of Nicholas Keiser, deceased, Bessie Keiser, administratrix of the estate of George Keiser, and her attorney, John H. Buck, were also present at the conference. Mr. Riskind and several of the Nicholas Keiser heirs there charged that George, during his lifetime, had appropriated assets belonging to his father consisting of cash and securities worth approximately \$5,000, which they said were contained in George's safety deposit box in the Continental Illinois National Bank. It is claimed by the appellant, John Joseph Keiser, administrator of his father's estate, that Bessie Keiser, purporting to be familiar with George's business affairs, admitted that her husband had misappropriated funds belonging to his father and that she had agreed at the conference to turn over the assets in her husband's safety deposit box to the administrator of the estate of Nicholas Keiser.

Thereafter, March 28, 1938, John Joseph Keiser filed a petition in the Probate court repeating the accusations made at the foregoing conference, alleging that Bessie Keiser had admitted the defalcations of her husband and had agreed to turn over the funds so taken to the administrator of Nicholas Keiser's estate, and asking the consent of the Probate court thereto. An order was accordingly entered directing her to deliver the assets in her husband's safety deposit box, to

Probate court appointed as administrator of the estate of George Kaiser, deceased. It appears that the brothers and sisters of George Kaiser, acting on information that their father George had taken possession of the assets of his father's estate and many registered funds and property belonging thereto, called a conference of all the children and heirs of Nicholas Kaiser, which was held in the town of March 1935, shortly after George's death, David A. Kaiser, an attorney representing the estate of Nicholas Kaiser, deceased, and the estate of the father of George Kaiser, and the attorney, John A. Kaiser, were also present at the conference. Mr. Kaiser and several of the Nicholas Kaiser heirs there charged that George, during his lifetime, had appropriated assets belonging to his father and several of his children and several of his children's children. It was stated that they were contained in George's safe deposit box in the Continental Illinois National Bank. It is claimed by the defendant, John Joseph Kaiser, administrator of the estate of George Kaiser, that Kaiser, purporting to be a partner with George's business affairs, admitted that her husband had misappropriated funds belonging to his father and that she had agreed to the contribution to turn over the assets in her husband's safety deposit box to the administration of the estate of Nicholas Kaiser. Thereafter, March 10, 1935, John Joseph Kaiser filed a petition in the probate court repeating the accusations made at the foregoing conference, stating that George Kaiser had admitted the defalcations of her husband and had agreed to turn over the funds so taken to the administrator of Nicholas Kaiser's estate, and asking the consent of the probate court thereto. An order was accordingly entered directing her to deliver the assets in her husband's safety deposit box, to

be held until further order of the court, and a guardian ad litem was ordered to be appointed to represent the five minor heirs of George Keiser, deceased. No guardian was appointed at the time, but subsequently, March 24, 1942, Bessie Keiser, as administratrix, filed a petition in the Probate court charging that the agreement to turn over assets was obtained by threats, fraud and duress, asking that the agreed order of January 15, 1942 finding against the guardian, be vacated, stating that the final account and report of John Joseph Keiser, as administrator of his father's estate, which had theretofore been entered and approved by the Probate court, had been vacated February 26, 1942 on petitioner's motion, and asking that a hearing on its merits be had on the ownership of the items taken from the safety deposit box.

When the matter came up for hearing December 15, 1942 before Judge O'Connell of the Probate court, an order was entered finding that no guardian ad litem had ever been appointed to represent the minor heirs of George Keiser, deceased, as provided for by the order of March 28, 1938, and the court then named Edward F. O'Toole as guardian ad litem for George Keiser's minor children. At the same time the guardian and Bessie Keiser, as administratrix of George Keiser's estate, were given leave to file instanter their answers to the petition of March 28, 1938, and the matter was set down for hearing.

May 21, 1943 an order was entered in the Probate court ordering that the agreement set forth in the petition of John Joseph Keiser, administrator, which had been filed March 28, 1938, be approved, and that two minor items appearing in his final account as administrator, be disallowed, finding that Bessie Keiser had been guilty of

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laches in her petition of March 24, 1942, and holding that she was entitled to receive, as administratrix of the estate of her husband, the sum of \$610.33, an item which is not involved in this litigation.

Bessie Keiser took an appeal from that order to the Circuit court, where the case was tried de novo on March 15, 1944. It was agreed between counsel for the respective parties that the only issue before the Circuit court was whether or not the assets in the safety deposit box of George Keiser, deceased, belonged to the estate of Nicholas Keiser, deceased, or to that of his son George. Edward F. O'Toole was again appointed guardian ad litem to represent the minor children of George Keiser, and he filed his appearance and answer. Upon the hearing John Joseph Keiser and his two sisters, Virginia and Susan, and their attorney all repeated the general accusations that George Keiser had misappropriated assets of his father's estate and that George had been handling his father's affairs for many years, but no one testified to any particular business transactions which George had handled or negotiated for his father, or as to any specific assets which he had misappropriated. Susan made a general statement that her father had \$20,000 when he died, and said that George took care of it subsequent to her father's death, but she did not know how much he had in cash or stocks or give any particulars as to his assets. When another sister, Virginia, testified that her father had left stocks and securities, the court made the following pertinent inquiry: "Don't you think we ought to find out how much, where it was, what it consisted of; if he left some stocks, what they were, and so forth? Then we have at least some idea"; but no attempt was made to follow the court's suggested inquiry,

laches in her petition of March 24, 1942, and holding that she was entitled to receive, as administratrix of the estate of her husband, the sum of \$10,000, an item which is not involved in this litigation.

Bessie Weiser took an appeal from that order to the Circuit Court, where the case was tried de novo on March 15, 1944. It was agreed between counsel for the respective parties that the only issue before the Circuit Court was whether or not the assets in the safety deposit box of George Weiser, deceased, belonged to the estate of Nicholas Weiser, deceased, or to that of his son George. Weiser.

On the day of the trial, the Circuit Court was again requested permission to listen to a statement of the minor children of George Weiser, and he filed his application and answer. Upon the hearing to a George Weiser and his two sisters, Virginia and Susan, and their attorney all requested the removal of the case to the Circuit Court. It was requested that the assets of his father's estate and that George had appropriated his father's assets for many years, but no one testified to any particular business transactions which George had handled or negotiated for his father, or to any specific assets which he had appropriated. Susan made a general statement that her father had \$20,000 when he died, and said that George took care of it subsequent to her father's death, but she did not know how much he had in cash or stocks or give any particulars as to his assets. Then another sister, Virginia, testified that her father had left stocks and securities, the court made the following pertinent inquiry: "Don't you think we ought to find out how much, where it was, what it consisted of; if he left some stocks, what they were, and so forth? Then we have at least some idea"; but no attempt was made to follow the court's suggested inquiry.

and no detailed evidence was introduced on that subject. The parties stipulated that at the time Nicholas Keiser died he had a bank account in the sum of \$2,406.37. It is suggested, but not argued, by the Nicholas Keiser children that the bank book evidencing this account was found in George's possession after his death, but the record discloses that it was found in the closet of a bedroom which George had used when he slept at his deceased father's home instead of his own, and no testimony was given that George had made any deposits or withdrawals from that account. It appears from the testimony of John Joseph Keiser that he lived with his father up to the time of his death; that his father had not been employed subsequent to 1927 or 1928; that he was last employed by the Illinois Central Railroad as a common laborer, and before that he worked for Dolese[&]/Shepard, first as a digger in the quarry and later as a stationary fireman at a salary of \$200 a month.

As against this evidence Bessie Keiser testified that her husband George had been buying stocks and bonds since 1915, and that in some years he turned over as much as \$15,000 of business; that some of the brokers with whom he did business were S. B. Chapin and Company, Winthrop and Harris, and James R. Oliphant and Company; and that he had been employed on the Belt Railroad for about 30 years as a railroad car inspector.

Testifying on behalf of Bessie Keiser, administratrix, Fred M. Baxter, assistant secretary of the Public Service Company of Northern Illinois, stated that his concern had issued four stock certificates for one share each in the name of George Keiser in 1931 and 1932, and that they were later, in 1934, canceled by the issuance of a new certificate for four shares of common stock, also in the name of George Keiser.

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Chester B. Swan, stock transfer agent for the Commonwealth Edison Company, testified that in October 1937 four shares of Public Service Company of Northern Illinois were turned in, and in lieu thereof 12 shares of stock of the Commonwealth Edison Company were issued in the name of George Keiser.

James F. Smith, one of the partners in S. B. Chapin and Company, disclosed that it had had an account for George Keiser, that he had bought and sold bonds of the Chicago, Milwaukee, St. Paul and Pacific Railway Company from June 5, 1931 to April 28, 1932, and that S. B. Chapin and Company had on April 28, 1932 delivered to George Keiser \$5,000 of bonds of the Chicago, Milwaukee, St. Paul and Pacific Railway Company.

Herbert H. Kant, vice president of Greenebaum Investment Company, was also called to testify on behalf of Bessie Keiser, administratrix; and while on the stand, the attorneys for the respective parties stipulated that on January 6, 1926 Greenebaum Sons Investment Company sold a bond of the Eitel Building to George Keiser which on January 7, 1937 was exchanged by him for a participation certificate for 5 shares of the Randolph Hotel Company. Substantially all the foregoing bond and stock transactions occurred long before the date of Nicholas Keiser's death.

In the course of the hearing in the Circuit court the parties stipulated that John Joseph Keiser, as administrator, had sold all the securities involved under an order of the Probate court for the sum of \$2,481.43 which, together with the cash that was found in the box in the sum of \$2,293, constituted a total of \$4,774.43.

As ground for reversal John Joseph Keiser, the administrator of his father's estate, now argues that Bessie Keiser,

administratrix of her husband's estate, was guilty of laches, that she failed to prove duress, and that she adopted the wrong procedure in the Probate court by coming in on petition, as she did, instead of resorting to a citation proceeding, as provided in sections 335-338 of chapter 3, Ill. Rev. Stat. 1943. From a careful examination of the record, it clearly appears that none of these issues was submitted to the Circuit court either by appropriate pleadings or evidence touching upon the subject matter of the defenses, but that the parties expressly stated that the only issue before the court involved the ownership of the bonds, stocks, securities and cash found in George Keiser's safety deposit box after his death. Therefore the only question before the court was as to which of the two estates owned the disputed assets. The courts of this state have repeatedly held that a point not raised on trial cannot be urged on appeal (Oliver v. Retirement Board, etc., 311 Ill. App. 38, Quinlan & Tyson, Inc. v. National Casualty Company, 311 Ill. App. 369), and that a case cannot be tried on one theory in the trial court and on another theory in the reviewing court. (Clerken v. Cohen, 315 Ill. App. 222, Kinne et al. v. Duncan et al., 315 Ill. 577, Off et al. v. The Exposition Coaster, Inc., et al., 336 Ill. 100.) Therefore, the question presented is whether the evidence supports the finding and judgment of the Circuit court that the disputed assets belonged to the estate of George Keiser, deceased. As heretofore indicated, the proof adduced by the administrator of the estate of Nicholas Keiser was extremely vague. Except for the specific statement that the bank account consisted of \$2,406.37, the testimony of the witnesses was generally to the effect that Nicholas Keiser had considerable assets.

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The court was evidently not satisfied with the probative value of the testimony and suggested to one of the daughters that some effort ought to be made to prove in detail the nature and extent of Nicholas Keiser's assets, but no such evidence was forthcoming. Indeed, except for the bank account, there is no evidence showing a single item or asset belonging to Nicholas Keiser. After the court had suggested that some detailed proof be introduced as to the assets possessed by Nicholas Keiser prior to his death the case was adjourned for two weeks, and Bessie Keiser then adduced the affirmative proof hereinbefore summarized with respect to the stock and bond transactions of her husband over a period of many years, prior to the death of his father, Nicholas. In the absence of any convincing proof that George Keiser had been guilty of the misappropriations, we think the evidence adduced by his widow abundantly sustains the chancellor's finding and judgment.

Both parties argue the question of laches. We find no such plea of record, and no evidence was introduced upon the subject. The children of George Keiser, deceased, have a two-thirds interest in the disputed assets, and even if the plea had been interposed, they should not be deprived of their rights on the ground of laches under the circumstances of this proceeding. On the face of the record a period of approximately four years elapsed between the filing of the petition and the hearing, but the administrator of the estate of Nicholas Keiser is responsible for much of the delay. When the petition was first presented to the Probate court in 1938, an order was entered for the appointment of a guardian ad litem to represent the five minor children. The administrator took

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no steps to bring about the appointment or to press the matter for hearing, and it was not until December 15, 1942 that a guardian was appointed, on motion of Bessie Keiser, administratrix of her husband's estate, and the petition of March 28, 1938 was then set for trial.

Upon the only issue involved, we are of opinion that the findings of the court are supported by abundant evidence, and the order appealed from should therefore be affirmed. It is so ordered.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

no steps to bring about the removal or to press the matter for hearing, and it is not until October 1, 1942 that a guardian was appointed, an action of habeas corpus administered to her husband's estate, and the petition of March 12, 1941 was brought for trial. Upon the only issue involved, as to the opinion that the findings of the court are supported by clear and convincing evidence, and the order of the court is affirmed. It is so ordered.

W. H. H. H.

Witness my hand and seal of office, this 1st day of March, 1942.

43210

IN THE MATTER OF THE ESTATE
OF GIROLAMO FIUMEFREDDO,
DECEASED.

JOHN FIUMEFREDDO et al.,
Petitioners - Appellants.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

3201A.261

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

John Fiumefreddo, son of Girolamo Fiumefreddo, deceased, and Jennie, Jerome and James Levatino, his grandchildren, heirs at law and legatees, filed a petition in the Probate court of Cook county to set aside an award to his widow, Nunzia Fiumefreddo, which was granted. On appeal of Charles V. Pagano, administrator with the will annexed, to the Circuit court of Cook county, the order of the Probate court was vacated and the widow's award was reinstated. This appeal is taken from that order.

It appears from the petition filed in the Probate court that Girolamo Fiumefreddo died in Chicago January 10, 1942, leaving personal estate consisting, among other things, of household furniture and furnishings, 413 shares of common stock of the Midland United Company of Delaware, the proceeds of an insurance policy issued by the Union Life Insurance Company of Chicago, accounts receivable, mortgages, two savings accounts, one in the sum of \$2,046.21 on deposit in the City National Bank and Trust Company of Chicago, and the other in the sum of \$2,027.13 on deposit in the Continental Illinois National Bank and Trust Company of Chicago, both held jointly with his wife, Nunzia Fiumefreddo, and an apartment building located at 2119 North Kenmore avenue, Chicago.

Prior to the probate of Fiumefreddo's last will and testament, a settlement agreement was entered into January 21, 1942 among all the heirs at law and next of kin of the deceased, which recited that they were "desirous of making an amicable

IN THE MATTER OF THE ESTATE
OF CARLOS M. LAMARCA
DECEASED.

STATE OF ILLINOIS

COUNTY OF COOK

1942

JOHN TIMOTHY LAMARCA et al.,
Petitioners.

vs. JAMES EMMETT LAMARCA and others.

John Timotheo, son of deceased, and James Timotheo, his grandchild, and James Timotheo, his grandchild, being at law and legal heirs, filed a petition in the Probate Court of Cook County to set aside the will of the deceased, James Timotheo, which was granted, on appeal of Charles V. Pagano, administrator with will annexed, so the Circuit Court of Cook County, the cause of the will to admit was vacated and the will was annulled. The appeal is taken from that order.

It appears from the petition filed in the Probate Court that Carlos Timotheo died in Chicago, January 12, 1942, leaving personal estate consisting, among other things, of household furniture and furnishings, all things of common stock of the Illinois United Company of Chicago, the proceeds of an insurance policy issued by the Union Life Insurance Company of Chicago, amounts receivable, notes, two savings accounts, one in the sum of \$2,000.00 on deposit in the City National Bank and Trust Company of Chicago, and the other in the sum of \$2,000.00 on deposit in the Continental Illinois National Bank and Trust Company of Chicago, both held jointly with his wife, Emma Timotheo, and an apartment building located at 2119 North Fenimore Avenue, Chicago. Prior to the probate of Timotheo's last will and testament, a settlement agreement was entered into January 21, 1942 among all the heirs at law and next of kin of the deceased, which recited that they were "desirous of making an amicable

adjustment, between themselves, concerning certain of said personal property and the said real estate," and that in consideration of the mutual promises of the parties, "particularly the release of interest of the First Party [the widow] in certain real estate at 2119 North Kenmore Avenue *** to the Second Parties [the other heirs and legatees]," the latter assigned and transferred to the widow the cash deposited in the joint accounts, the household furnishings and furniture, 413 shares of common stock of the Midland United Company, and the proceeds of the Union Life Insurance Company policy; and the widow on her part agreed to quitclaim all of her interest in and to the property described as 2119 North Kenmore avenue, as follows: an undivided one-half to John Fiumefreddo and an undivided one-half to the Levatino grandchildren as joint tenants and not as tenants in common. The agreement further provided that the proceeds of any mortgages and accounts due and owing to the deceased during his lifetime should be distributed upon the collection thereof, one-third to the widow, one-third to John Fiumefreddo, and one-third to the Levatino grandchildren; that the cost of administration should be borne by the son and grandchildren; that the widow should pay all of the expenses of the deceased's last illness; that the funeral expenses should be shared, one-third each, by the widow, John Fiumefreddo, and the Levatino grandchildren; that the widow should be allowed to remain, rent free, in one of the Kenmore avenue apartments for a period not to exceed six months; that the widow, if appointed as executrix, would waive any fee to which she should be entitled as such, and that she would retain and employ as her attorneys the firm of Fleck, Calcagno & Pollack, attorneys for

adjustment, between themselves, concerning certain of said personal property and the said real estate," and that in consideration of the mutual promises of the parties, "particularily the release of interest of the first party [the widow] in certain real estate at 2112 North Kenmore Avenue known to the second party [the other heirs and legatees], the latter assigned and transferred to the widow the cash deposited in the joint accounts, the household furnishings and furniture, all shares of common stock of the Midland United Company, and the proceeds of the Union Life Insurance Company policy; and the widow on her part agreed to maintain all of her interest in and to the property described as 2112 North Kenmore Avenue, as follows: an undivided one-half to John Timmerbroed and an undivided one-half to the Revettine grandchildren as joint tenants and not as tenants in common. The agreement further provided that the proceeds of any mortgages and accounts due and owing to the deceased during his lifetime should be distributed upon the collection thereof, one-third to the widow, one-third to John Timmerbroed, and one-third to the Revettine grandchildren; that the cost of administration should be borne by the son and grandchildren; that the widow should pay all of the expenses of the deceased's last illness; that the funeral expenses should be shared, one-third each, by the widow, John Timmerbroed, and the Revettine grandchildren; that the widow should be allowed to remain, rent free, in one of the Kenmore Avenue Apartments for a period not to exceed six months; that the widow, if appointed as executrix, would waive any fee to which she should be entitled as such, and that she would retain and employ as her attorneys the firm of Fleck, Calceagno & Pollack, attorneys for

the son and grandchildren. The concluding paragraph of the contract states that the "document contains the entire agreement between the parties hereto."

Petitioners alleged and they now argue that the agreement disposed of all assets of the deceased and left nothing out of which to pay a widow's award, and in the course of the argument supporting this contention, they go outside the record to assert that "the widow received two bank accounts of substantial amount, the proceeds of which could have been made subject to probate, and which would have decreased her share of such money," and also that "the widow received more than she would have been entitled to had the estate been probated." The administrator likewise goes outside the record, asserting that the furniture was more than 20 years old, that the insurance policy was invalid, the stock worthless and known to be so by petitioners when the agreement was made, that there were no mortgages or accounts receivable due the deceased, and that there were other assets in the estate which were not contemplated, included or mentioned in the family agreement. Since the administrator's answer denied the allegation of the petition that the agreement disposed of all the assets and petitioners failed to introduce any evidence whatever to support the allegation, either in the Probate court or in the Circuit court on appeal, petitioners' argument has no foundation in fact upon the record presented. The agreement itself refutes the contention made. It recites in the opening paragraph that the personal estate of the deceased consisted, "among other things," of household furniture, common stock, etc., and in another clause employs the phrase "concerning certain of the said personal property." Therefore, in the absence of any evidence as to the total assets of the estate, the contro-

versy must be determined from the intent and purpose of the agreement itself.

The authorities are generally to the effect that the widow's award will not be barred by any contract unless it is specifically waived or unless it clearly appears that such was the intention of the parties. Any uncertainty will be resolved in favor of the right. The administrator relies largely on Pratz v. Pratz, 122 Ill. pp. 101. In that case Jonathan Pratz and Lucinda Newcomer, before their marriage, entered into an agreement under seal reciting that marriage was intended between them, that they were each possessed of an estate in Stark county, and that in consideration of the intended marriage "each party aforesaid, by these presents, remise, release and relinquish each to the other all right, title and claim as dower or thirds in any portion of personal or real estate of which the said parties may be possessed of at the demise of either, and the survivor further agrees to abide by what either party may see fit and proper to dispose of by will and testament." Jonathan Pratz died, leaving a last will by which he gave his wife Lucinda \$500. On that state of facts the court held that the contract did not deprive the wife of a widow's award, and said: "All that it relinquished is dower and thirds in personal and real estate. Neither of those terms covers the widow's award to which a widow is entitled, notwithstanding her receipt of dower and the portion of the personal property cast upon her by the Statute of Descents. *** Unless the will provides that a gift to the wife shall bar her of the widow's award, the widow is entitled to the widow's award notwithstanding her acceptance of every provision made her by the will. By this contract the wife agreed to accept whatever her husband saw fit to give her by his last will, but the contract contains no

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suggestion that she should thereby bar herself of the statutory provision for a widow's award. It may be that the parties meant that these provisions should exclude every other allowance, but they did not say so, and we have no means of ascertaining their intention except the words they employed. A widow's award is viewed with favor by the law, inasmuch as it is established from motives of public policy, and the widow's award will not be barred by any contract unless it is clear that such was the intention of the parties. Inasmuch as the parties did not see fit to employ any language depriving the widow of her right to an award, we think the court below correctly approved the action of the appraisers in that respect. (Italics ours.)

In Yockey v. Marion, 269 Ill. 342, it was held that a provision in an antenuptial contract that the intended wife accepts the provisions made for her "in lieu of and in satisfaction and bar of dower or thirds to which by the common law or by custom or otherwise she might be entitled ~~***~~, in or out of the property" of the intended husband, was not broad enough to bar the widow's award. Mr. Justice Cartwright, speaking for the court, said that "The widow's award is a statutory allowance for the benefit of the widow, and where it is neither released in terms nor by language sufficiently broad to include it, it should not be regarded as relinquished."

McKara v. Englund, 265 Mich. 214, 251 N. W. 308, presents a situation similar to the one here under consideration. There the husband died intestate, leaving a widow and four children by a previous marriage. After the administrator was appointed on the widow's petition, she entered into an agreement with the children disposing of all the property of the estate, and a quitclaim deed was given by the widow to real estate belonging to the deceased. The children contended that the widow's award

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 from motives of public policy, and the widow's share will not
 be denied to her, except where it is shown that the
 intention of the parties was to deprive her of her share.
 It is to be noted that the parties intended to give to
 the widow, as this is the case, and the widow's share is
 of the estate in the same manner as the widow's share.

In *Boyle v. Boyle*, 101 N. D. 100, it was held that a
 provision in an antenuptial contract that the husband's
 estate the provisions made for her in his will and in estate-
 taxation and bar of dower or thirds is valid by the common law
 or by custom or otherwise, and is not to be stricken out
 of the property of the intended husband, was not void on the
 to bar the widow's share. It was held that the widow, speaking for
 the court, said that "the widow's share is a widow's share-
 ance for the benefit of the widow, and where it is not that
 related in terms nor by language, and not only bound to include
 it, it should not be removed as being invalid."

Boyle v. Boyle, 101 N. D. 100, 101 N. D. 100, presents
 a situation similar to the one here under consideration. There
 the husband died intestate, leaving a widow and four children
 by a previous marriage. After the administrator was appointed
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 the children disposing of all the property of the estate, and
 a quitclaim deed was given by the widow to real estate belonging
 to the deceased. The children contended that the widow's award

was barred by the contract, but the court held otherwise, and pointed out that there was no agreement to dispense with administration, although the settlement was complete as to the division of the property, and also that there was no agreement for the payment of debts or the widow's allowance. The pertinent part of the opinion is as follows: "So if the estate is being administered she is entitled, as a matter of right, to the statutory allowance, unless for a consideration she has expressly agreed to waive it, or has consented to a distribution without administration. *** The fact that there was an agreement for division of the property does not in itself bar her right to the statutory allowance for support during the administration of the estate." In the case at bar no provision was made to dispense with probate, and the agreement does not waive the widow's award nor use any language whatever indicative of that intention. Neither does it contain any provision making the agreement supersede or act in bar of probate which has been pending and is still pending in the Probate court:

Cases cited by the administrator follow the principle enunciated in the foregoing decisions. Thus, in Allen v. Allen, 222 Ill. App. 438, the court held that an antenuptial agreement whereby each party releases all rights in the property of the other, will not bar the statutory widow's award. In In re Brown's Will, 274 N.Y.S. 924, the court, in holding that unless a separation agreement has released the wife's right to receive her exemption, she is entitled to have what the law provides, said: "Inference or implication is not sufficient to effect the release of property rights." In In re Andres' Estate, 126 Cal. App. 146, 14 Pac. (2d) 566, the court held that in order to bar a family allowance, the wife's intention to waive her right in a written agreement must be clear and explicit, and

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that any uncertainty in the language of the agreement will be resolved in favor of the right.

The foregoing authorities are expressive of the settled rule that the statutory allowance for the benefit of the widow will not be regarded as relinquished, unless it is released in express terms or by language sufficiently broad to indicate such intention. Accordingly, we think the Circuit court properly allowed the widow's award in the amount of \$900, and the order is therefore affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Seanlan, J., concur.

that any uncertainty in the language of the agreement will be resolved in favor of the right.

The foregoing provisions are subject to the proviso that the Statutory Commission for the benefit of the widow will not be regarded as relinquishing, unless it is shown in express terms or by language which would be understood such intention, accordingly, as to the Statutory Commission properly allowed the widow's award in the amount of \$500, and the order is therefore affirmed.

U. S. I. 100

Sullivan, J. J., and Johnson, J., concur.

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FRED B. TIDD and A. R. TIDD,
doing business as FRED B. TIDD
TYPESETTING COMPANY, and FRED
B. TIDD TYPESETTING COMPANY,
a corporation,
Appellants,

v.

LA SALLE INDUSTRIAL FINANCE
CORPORATION, a corporation,
Appellee.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

32618.2/621

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from an order striking their fourth amended complaint and dismissing the cause.

Fred B. Tidd and A. R. Tidd, plaintiffs, filed a complaint, on the chancery side of the court, for an injunction to restrain defendant from foreclosing a certain chattel mortgage. The complaint alleged that the chattel mortgage was executed by Fred B. Tidd and A. R. Tidd, doing business as Tidd Typesetting Company; that the chattels had theretofore been the property of a corporation of the same name that had been dissolved prior to the execution of the mortgage. Attached to the complaint as exhibits were copies of the chattel mortgage and an affidavit for extension of the same. The mortgage recites that it is made by "Fred B. Tidd Typesetting Company (a corporation, organized and existing under and by virtue of the laws of the state of Illinois)"; that "This mortgage, made, executed and delivered in pursuance of a resolution duly adopted at a meeting of the Board of Directors of the undersigned corporation * * *." The mortgage is signed on behalf of the corporation by Fred B. Tidd, as Vice President, and it bears what purports to be the corporate seal of the corporation. The original mortgage loan, made July 25, 1941, was for \$6,700, and on October 17, 1942, a balance of \$4,500 was extended to

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Journal of Management Education 30(6)

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December 7, 1942. In an affidavit for extension, signed by Fred B. Tidd, he states that he is "Vice-President of Fred B. Tidd Typesetting Company, an Illinois Corporation." The basis for the relief asked in the complaint was that a material alteration had been made in the original mortgage and note, by which the date was changed from July 25, 1941, to July 28, 1941, and that the alteration invalidated the instruments; also, that the loan was not in fact made to the corporation, which had been dissolved, but to the individual plaintiffs, and that the loan was in contravention of the Illinois usury laws. Pursuant to section 48 of the Civil Practice Act (ch. 110, par. 172, sec. 48, Ill. Rev. Stat. 1943) defendant filed a motion to dismiss the complaint on the ground that the claim set forth in plaintiffs' pleading had been released, and in support of the motion defendant filed an affidavit of Eli I. Kleinman, president of defendant corporation, to the effect that plaintiffs since the filing of suit had offered to pay the sum of \$6,300 in full settlement of the indebtedness secured by the chattel mortgage, and that on February 9, 1943, the Illinois Credit Company had paid the sum of \$6,300 to defendant in consideration for releases of the chattel mortgage indebtedness of Fred B. Tidd Typesetting Company, and defendant had simultaneously delivered releases of the said chattel mortgage, and at the same time the Illinois Credit Company delivered to defendant an authorization in writing of Fred B. Tidd Typesetting Company signed by Fred B. Tidd, President, authorizing Illinois Credit Company to pay approximately \$6,350 to LaSalle Industrial Finance Corporation and to receive a release of the chattel mortgage and of other evidences of indebtedness. Plaintiffs filed a counter-affidavit. The chancellor granted the motion

to dismiss the chancery complaint but granted plaintiffs ten days to file an amended complaint at law and transferred the cause to the law side of the court. Thereafter plaintiffs filed five successive complaints at law, to each of which a motion to dismiss was filed. Plaintiffs filed the first amended complaint at law without waiting for the ruling by the court upon the motion to dismiss. The same procedure followed the motion to dismiss the first amended complaint. The fourth amended complaint at law names as plaintiffs Fred B. Tidd and A. R. Tidd, who filed the original chancery complaint, which was verified, and also the corporation which the said original complaint alleged had been dissolved. In each motion to dismiss filed by defendant express reference was made to the affidavit filed by defendant in support of its motion to dismiss the original complaint in chancery. The trial judge certifies in the report of proceedings that "At the hearing on the defendant's motion to dismiss the fourth amended complaint there were presented to me and considered by me, among other things, in rendering my decision, without objection by any of the parties, the following items which then formed a part of the court files in the above entitled cause: 1. The original complaint in chancery and exhibits attached thereto and incorporated therein. 2. Motion to dismiss filed by the defendant on March 25, 1943. 3. Affidavit of Eli Kleinman in support of motion to dismiss and Exhibit 1 incorporated therein filed March 25, 1943. 4. Order entered on March 25, 1943 dismissing complaint in chancery and granting leave to file amended complaint at law. 5. Counter-affidavit in opposition of defendant's motion to dismiss filed May 17, 1943."

Defendant's complaint that because of the nature of the brief filed by plaintiffs it has been difficult for it to

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 3. Affidavit of Mr. Newman in support of motion to dismiss
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 "At the hearing on the defendant's motion to dismiss the
 the trial judge certified in the record of proceedings that
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ascertain the exact points raised by plaintiffs is not without some merit. We will endeavor, however, to consider plaintiffs' points as we understand them.

Plaintiffs contend: "By their motion to dismiss everything well pleaded in the Fourth Amended Complaint was admitted. The affidavit attached thereto could not be evidenced as it only raised a question of fact, along with the counter-affidavit of Fred P. Tidd. A jury had been demanded and the subject matter of the affidavits were questions for a jury, or for the trial Court on a trial of the event by the court alone upon evidence presented." In connection with the foregoing contention plaintiffs make the following statement: "We do not object to consideration by the Court of the affidavits and counter-affidavits, but do object to the passing on the truth or falsity of the allegations in the affidavits or counter-affidavits as being a violation of our constitutional right to a jury trial." In view of this statement we do not deem it necessary to pass upon the contention of defendant that in passing upon defendant's motion to dismiss the trial court had a right to consider the affidavits even if plaintiffs had objected to his doing so.

In any event, plaintiffs abided by the procedure followed by the trial court and they would have no right upon appeal to question the procedure followed. But plaintiffs' further contention, that the counter-affidavit raised material issues of fact which should have been submitted to a jury, must be considered.

Section 48 of the Civil Practice Act provides that the defendant may file a motion to dismiss the action, supported by affidavits, "where any of the said following defects exist but do not appear upon the face of the complaint: * * * (g) That the claim or demand set forth in the plaintiff's pleading

ascertain the exact points raised by defendant's motion without some merit. The court, however, is not to consider

plaintiff's points as we stand here.

Plaintiff's contentions are as follows:

everything well pleaded in the complaint is admitted. The defendant's motion is not to be considered as it only raises a question of fact, and the court is not to consider it. The court is to consider the subject matter of the motion, and the court is to consider the subject matter of the motion.

and the court is to consider the subject matter of the motion, and the court is to consider the subject matter of the motion.

with the following contentions: The court is to consider the subject matter of the motion, and the court is to consider the subject matter of the motion.

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of our constitutional right to a trial by jury, and the court is to consider the subject matter of the motion, and the court is to consider the subject matter of the motion.

this statement is not to be considered as it only raises a question of fact, and the court is to consider the subject matter of the motion, and the court is to consider the subject matter of the motion.

contention of defendant's motion, and the court is to consider the subject matter of the motion, and the court is to consider the subject matter of the motion.

motion to dismiss the trial court's order to dismiss the motion, and the court is to consider the subject matter of the motion, and the court is to consider the subject matter of the motion.

affidavits even if defendant's motion is not to be considered as it only raises a question of fact, and the court is to consider the subject matter of the motion, and the court is to consider the subject matter of the motion.

In any event, plaintiff's motion is not to be considered as it only raises a question of fact, and the court is to consider the subject matter of the motion, and the court is to consider the subject matter of the motion.

by the trial court and they will have to wait until the court is to consider the subject matter of the motion, and the court is to consider the subject matter of the motion.

to question the procedure followed. But plaintiff's motion is not to be considered as it only raises a question of fact, and the court is to consider the subject matter of the motion, and the court is to consider the subject matter of the motion.

contention, that the court is to consider the subject matter of the motion, and the court is to consider the subject matter of the motion.

of fact which should have been admitted to a jury, and the court is to consider the subject matter of the motion, and the court is to consider the subject matter of the motion.

considered.

Section 48 of the Civil Practice Act provides that the

defendant may file a motion to dismiss the action, supported

by affidavits, "where any of the following defects exist

but do not appear upon the face of the complaint: * * * (g)

That the claim or demand set forth in the plaintiff's pleading

has been released." Attached to the affidavit of defendant in support of the motion to dismiss is the following exhibit:

"COPY OF AUTHORIZATION"

"The undersigned hereby authorized the Illinois Credit Company, of 188 W. Randolph St., Chicago, Illinois, to pay approximately \$6,350.00 to LaSalle Industrial Finance Company, and balance apply to fire insurance premium.

"The undersigned further authorizes said Illinois Credit Company of Chicago to receive in its behalf, Release of chattel mortgages, paid up Conditional Sales Contract, cancelled chattel mortgage notes, insurance policies, and all other papers pertaining to the undersigned's indebtedness with the above company.

"FRED B. TIDD TYPESETTING CO.

"By Signed Fred B. Tidd
"President

"Dated January 20th, 1943

"Corporate Seal"

In plaintiffs' counter-affidavit they state that they executed a chattel mortgage (apparently upon the same chattels that were covered by the mortgage given by plaintiffs to defendant) and note to the Illinois Credit Company for the purpose of refinancing defendant's loan to plaintiffs; they admit that they executed and delivered to Illinois Credit Company the direction to pay \$6,300 to defendant in satisfaction of its mortgage and note and to receive in plaintiffs' behalf various releases and canceled documents, and they do not deny that said authorization was given by them to Illinois Credit Company, but they state that after they gave said Credit Company the said direction and authorization they "discovered the facts concerning the material alteration of the said notes and mortgages, and the further fact that the dates therein had

been changed," and thereupon they revoked the authority of the Illinois Credit Company to pay defendant the sum of \$6,300, but they do not aver that defendant had notice or knowledge of the revocation. Defendant, therefore, in view of the agent's apparent authority, is not chargeable with the agent's alleged breach of instructions. If Illinois Credit Company was not authorized to pay to defendant the \$6,300, then that Company would have no claim against plaintiffs for reimbursement of the said sum.

It must be borne in mind that this is not a proceeding to foreclose the chattel mortgage in question or to obtain a judgment on the mortgage note, but it is a suit by a mortgage debtor to recover payments already made, and the burden is upon plaintiffs to prove that it would be against equity and good conscience for defendant to retain the money.

(City of Chicago v. Walkan, 119 Ill. App. 542; Koenig v. Peoples Gas Light & Coke Co., 153 Ill. App. 432; Watson v. Woolverton, 41 Ill. 241, 243.)

The unverified fourth amended complaint alleges that defendant "fraudulently, wrongfully, corruptly and materially" altered the chattel mortgage and the mortgage note by changing the date upon each of the instruments from July 25, 1941, to July 28, 1941. Plaintiffs contend that this was a fraudulent and material alteration by defendant and such alteration voided the note and chattel mortgage, and they argue: "In our case we had a lawful right to have the chattel mortgage renewed [recorded] 10 days after the execution which would have been the 4th of August, 1941, not thereafter, we gave no person a right to record the chattel mortgage any later but this right was wrongfully taken thus unduly lengthening the time of the mortgage coverage and also changing the time

of the power to confess judgment both in the note and garnishee. The Statute of Limitations is affected by the corresponding time and the various laws relating to extensions are also affected since the payee of the mortgage was not required to procure the extension affidavits as soon. * * * So in our case the legal effect of the right to record was changed, the Statute of Limitations was changed the time when extensions could be made was changed and the time when judgment could be confessed against the Plaintiff-Appellants was changed among many other changes in legal effect too numerous to mention. Making this alteration a material alteration." The provision in the statute as to the recording of a chattel mortgage is intended for the protection of creditors; as between the parties to the chattel mortgage it is not necessary to record it. The allegations in the complaint that defendant "fraudulently, wrongfully, corruptly and materially" altered the instruments in question are mere conclusions of the pleader. The alleged change in the dates of the instruments from July 25, 1941, to July 28, 1941, could not adversely affect plaintiffs' rights as to the time when judgment could be confessed against them. The point as to the Statute of Limitations is this: The Statute of Limitations would have run against defendant's right of action three days sooner if defendant had not made the alleged alteration. The point does not merit serious consideration, especially in view of the fact that plaintiffs settled defendant's claim many years before the Statute would have tolled. In plaintiff's fourth amended unverified complaint they allege that the extension agreement was executed by plaintiffs because defendant made false oral representations to plaintiffs that the note and mortgage were made on July 28,

1941, and that plaintiffs executed the extension agreement not knowing that it had been discharged by the material alteration in the instruments and that therefore plaintiffs were not legally liable for the payment of the note, and that by reason of the execution of the extension agreement plaintiffs lost large sums of money in usurious commissions and interests that were charged against them without right under the void agreement; that the execution of the extension notes was "a mere nudum pactum" and plaintiffs were entitled to recover the moneys they paid after the execution of the extension agreement, "since these were paid, without knowledge of the discharge the Court should permit a recovery of the monies so paid by mistake in ignorance of the discharge." This contention and the argument in support of it are based upon the assumption that defendant made fraudulent and material alterations in the note and mortgage, which alterations voided the contract between the parties. The mortgage and the note purported to have been executed by Tidd Type-setting Company, an Illinois corporation, and carried a corporate seal. Plaintiffs held themselves out to defendant as a legally organized corporation and they are estopped to deny the existence of the corporation. (Gay v. Kohlsaat, 80 Ill. App. 178, 186, and cases cited therein.) The Usury statute of Illinois does not apply to corporate borrowers. (Ch. 74, par. 4, Ill. Rev. Stat. 1943.) We have carefully considered the brief of plaintiffs and we fail to find therein any sound ground for the contention that the alleged alteration was a material one and that plaintiffs were damaged, or might have been damaged, by it. Many years ago the Supreme court, in Vogle v. Ripper, 34 Ill. 100, 106, held that "The effect of an alteration in a written instrument depends upon its nature, the person

[illegible]

by whom, and the intention with which it was made. If neither the rights or interests, duties or obligations of either of the parties are in any manner changed, an alteration may be considered as immaterial." In Hayes v. Wagner, 220 Ill. 256, 258, it appeared that the written contract "was afterward altered in material respects by changing the amount to be paid for the work from \$52,000 to 54,700, changing the date of the completion of the work, and making other alterations in the agreement." The court held that a material alteration of an executory written contract, even though made without fraudulent intent, destroys the instrument, but if there is an original debt or obligation which was not satisfied or extinguished, a recovery may be had on the original debt or obligation. The court further held that, under the facts of the case, the altered instrument might be offered in evidence, not as a basis for a recovery of damages, but only to show all the facts in relation to its execution as a part of the original transaction, and the changes made in it, in connection with all the facts and circumstances. It may be well to repeat at this point that the instant proceeding is not an action by defendant to foreclose upon the mortgage or to seek judgment upon the mortgage note. In plaintiffs' brief there is a suggestion, rather than a contention, that plaintiffs paid \$4,850 under duress; that when plaintiffs brought the original complaint for an injunction to prevent a threatened foreclosure, defendant in that proceeding made a motion to have a receiver appointed; and plaintiffs intimate that the said motion amounted to duress, and, therefore, plaintiffs can recover the \$4,850. The record does not show that defendant made a motion for the appointment of a receiver of the mortgaged

chattels, but defendant states in its brief that it did make such a motion but that no action was ever taken upon the motion. Such a motion did not constitute duress.

(See Mills v. Forest Preserve District, 345 Ill. 503; Hart v. Strong, 183 Ill. 349.)

After the motion to dismiss the original complaint in chancery had been sustained the trial court allowed plaintiffs five additional opportunities to file a good complaint against defendant. The contention of plaintiffs that their counter-affidavit raised issues of fact which should have been submitted to a jury, is without merit. Under the undisputed facts alleged in defendant's affidavit in support of the motion to dismiss, and the facts admitted in plaintiffs' counter-affidavit, there were no material issues of fact to be submitted to a jury. The action of the trial court, therefore, in sustaining the motion to dismiss the fourth amended complaint was justified.

The order appealed from is affirmed.

ORDER AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

43143

DOUGLAS WILSON,

Appellee,

v.

SUPERB CLEANING & DYEING
CORPORATION, a corporation,
and GEORGE BJELLAND,
Appellants.

326 A. 262
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action brought by the driver of a motor vehicle against the driver of another motor vehicle and the latter's employer. Plaintiff sued to recover damages to his automobile and injuries to his person. Each of the defendants filed a counterclaim, the corporation for damage to its automobile and the driver for personal injuries suffered in the accident. The corporation, later, dismissed its counterclaim. The jury returned a verdict in favor of plaintiff against both defendants and assessed his damages at \$1,200. The jury also returned a verdict finding plaintiff not guilty on the counterclaim. The trial court entered a judgment upon both verdicts. Later defendants filed motions for new trials, which were overruled, and defendants appeal from the judgment.

This case was tried before an able and experienced judge and many of the errors usually assigned in cases like the instant one are not urged upon this appeal. But two points are raised: (1) That the court erred in refusing to direct a verdict for defendants at the close of all the evidence because plaintiff's evidence shows that he was guilty of contributory negligence as a matter of law. (2) That the finding by the jury that defendants were negligent is contrary to the manifest weight of the evidence.

The accident occurred on December 10, 1941, about

DOUGLAS, MISSOURI

et al.

v.

OUTLINE CHARTER & TRADING
CORPORATION, a corporation,
and GEORGE J. LANE,
Defendants.

MR. JUSTICE SEAMAN delivered the opinion of the court.

An action brought by the driver of a motor vehicle

against the driver of another motor vehicle and the latter's

employer. Plaintiff sued to recover damages to his auto-

mobile and injuries to his person. Each of the defendants

filed a counterclaim, the corporation for damages to its

automobile and the driver for personal injuries suffered

in the accident. The corporation, later, dismissed its

counterclaim. The jury returned a verdict in favor of

plaintiff against both defendants and assessed his damages

at \$1,200. The jury also returned a verdict finding plain-

tiff not guilty on the counterclaim. The trial court entered

a judgment upon both verdicts. Later defendants filed motions

for new trials, which were overruled, and defendants appeal

from the judgment.

This case was tried before a able and experienced

judge and many of the errors usually assigned in cases like

the instant one are not urged upon this appeal. But two

points are raised: (1) That the court erred in refusing to

direct a verdict for defendants at the close of all the evi-

dence because plaintiff's evidence shows that he was guilty

of contributory negligence as a matter of law. (2) That the

finding by the jury that defendants were negligent is con-

trary to the manifest weight of the evidence.

The accident occurred on December 10, 1941, about

885 A. 508

DOUGLAS, MISSOURI

et al.

v.

OUTLINE CHARTER & TRADING
CORPORATION, a corporation,
and GEORGE J. LANE,
Defendants.

12:30 p. m., at the intersection of Diversey and Oakley avenues. Diversey avenue is a through street and has four lanes of traffic. Oakley avenue does not extend south of Diversey at that intersection. There is a bridge on Diversey, located about 600 feet east of Oakley. From the bridge west to Oakley at the time of the accident there was a continuous line of cars parked on both sides of the street. On the northeast corner of the intersection there is an automobile building, three or four stories high, which is approximately eight feet north of the north curb of Diversey. Plaintiff was a manufacturers' representative and just prior to the accident he had transacted business with the Chicago Pump Company, located a short distance north of Diversey. Defendant Bjelland was about seventy years of age at the time of the accident. He was a solicitor, "on a strictly commission basis," for Superb Cleaning & Dyeing Corporation, defendant, a corporation engaged in the laundry business. At the time in question he was driving an automobile belonging to that corporation and "was going for a pickup." He was wearing bifocal glasses. Plaintiff testified that he was forty-one years old; that after he left the plant of Chicago Pump Company he turned the corner at Wolfram street and went south on Oakley avenue toward Diversey; that he stopped just north of Diversey at the stop sign located eight feet north of the north curb of Diversey; that because of the automobile building on the northeast corner "you have to stop and then watch;" that as he approached the intersection he brought his car to a stop and then proceeded slowly until he could see both ways before he pulled out into the street; that before he proceeded into Diversey avenue he looked east and west, and saw two cars coming east and one car coming west; that the cars that were proceeding east were then about 200 feet from the intersection; that the car that was coming

west was 600 or 700 feet away; that he then proceeded to the center of Diversey and stopped there in order to let the cars going east pass; that he had also stopped his car before he crossed the north curb line of Diversey; that the westbound car was about 600 feet east of Oakley when he pulled into the intersection; that this westbound car did not stop and was going about thirty miles an hour at the time that it collided with his automobile; that while his car was facing south and standing still the westbound car kept coming and struck his car when it was west of the center line of Oakley and facing south; that the left side of his car was caved in by the impact and the left door was caved in about a foot to a foot and a half; that after the collision he saw that the automobile of the Superb Dyeing & Cleaning Corporation was dented at the front end ^{and} the lights and grill work were dented. Upon cross-examination he testified that before proceeding into Diversey avenue he stopped twice, once at the stop sign and once at the north sidewalk; that after looking west and east he saw that the westbound car was 600 or 700 feet east of Oakley and that he then drove to the center of the street and stopped; that when defendant's car was 500 feet east of Oakley it was still going thirty miles an hour and that his car (plaintiff's) was standing there perfectly still all this time; that defendant's car never slowed down or changed its speed and that it "drove right into the side of my car." He was asked why he did not turn his car east in front of the eastbound automobile and he answered that "you can't cut in in front of somebody." The witness further testified that about the time the eastbound cars passed him his car was hit. Upon redirect examination he testified that the last of the eastbound cars was just about in front of him when defendant's

car hit him. Plaintiff produced no other witness as to the accident. Defendant called Ben S. Freedman, who testified that he was in the United States Army at the time of the trial but was then on a furlough; that he witnessed the accident in question; that defendant's automobile was going west; that plaintiff's car was going south on Oakley and was making a turn into Diversey to go east; that the witness was driving an automobile and was following defendant's car west; that west of the bridge Diversey avenue has four lanes for traffic; that there were "heavily parked" cars on both sides of Diversey west of the bridge; that he first saw defendant's automobile as it was going over the bridge; that the witness was then about ten feet behind defendant's car and he continued to follow it; that defendant's car and his car were going about twenty miles an hour; that he saw plaintiff's car for the first time as it was pulling out into Diversey and that it was then going about ten miles an hour; that he did not see that car stop at any time before the accident; that defendant's car was about twenty-five feet east of the intersection when plaintiff's car pulled out onto Diversey and at that time the witness was about fifty feet behind defendant's car; that as soon as he saw plaintiff's car pull into Diversey defendant's car slowed down; that he saw the impact of the two cars and plaintiff's car was then in motion; that they may have moved a foot or two after the impact; that at the time of the impact defendant's automobile was going ten miles an hour or a little under that; that he did not know any of the parties to the proceeding. Upon cross-examination the witness testified that he was about fifty feet behind defendant's car when the collision occurred; that when the witness's car was seventy-five feet away plaintiff's car was pulling out past the north curb of Diversey; that plaintiff was

old hit him, but that he did not know who hit him.

Defendant's car was moving westward, and the witness

testified that he was in the middle of the intersection

when the collision occurred. He testified that the

defendant's car was moving westward and that the

witness's car was moving eastward. He testified that

the collision occurred in the middle of the intersection

and that the defendant's car was moving westward

and the witness's car was moving eastward. He testified

that there were no other vehicles in the intersection

at the time of the collision. He testified that the

defendant's car was moving westward and that the

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and the witness's car was moving eastward. He testified

that there were no other vehicles in the intersection

at the time of the collision. He testified that the

defendant's car was moving westward and that the

a little bit north of the north curb when the witness first saw him; that there may have been some traffic going east at the time; that when the witness was about seventy-five feet away from the intersection the westbound automobile was going about twenty miles an hour and that it slowed down to ten miles an hour or less at the time of the impact; that defendant's car was about twenty-five feet east of the intersection when it started to slow down and the speed of plaintiff's automobile remained about the same during the entire time that he saw it before the collision; that defendant's car kept going straight ahead and did not turn at all prior to the impact; that the front of defendant's car "came in contact with the middle of the left side, right at the doors" of plaintiff's car "making the turn;" that neither of the cars traveled after the impact; that defendant's car after the impact "was facing a little northwest, but still mostly west. Its left wheels were north of the center line [of Diversey] about four or five feet. The front wheels of the southbound car were just about on the center line of Diversey;" that he "couldn't observe to know whether or not this automobile (plaintiff's) came to a standstill before it ^{entered} the intersection. It may have come to a stop further back, but it didn't from the time I saw it." Upon redirect examination the witness testified that if one were to extend the east curb line of Oakley all the way south across Diversey the accident took place just about on that line. Upon recross-examination the witness testified that plaintiff's automobile, after the impact, was facing southeast, close to a forty-five degree angle; that the front part of that automobile was just about at the east curb of Oakley and the rear part of it was maybe five or six feet west of the east line; that plaintiff's

car was on the west side of Oakley until it started to make the turn, when it came over to the east side of Oakley; that when the witness was seventy-five feet away from Oakley avenue plaintiff's car came over from the westbound lane to the eastbound lane a little bit north of the north curb of Diversey; that in making the turn plaintiff came over to the east side of Diversey. Defendant George Bjelland, who testified for defendants, stated that he was very familiar with the intersection in question; that it was a fairly nice day and the streets were perfectly dry; that as he drove over the bridge he was driving at about twenty-five miles an hour; that as he drove west on the north half of the boulevard he was probably six or seven feet from the center of the street; that he saw plaintiff's car "just a few minutes before the accident." The following then occurred: "Q. Where was this other car when you saw it for the first time? A. Coming in off of Oakley. Q. How far were you away from it at the time you saw it coming in off Oakley, in feet? A. Well, 23, 24 feet, I would say. Q. When you saw this car come in off Oakley, how fast was it going? A. Well, about 20 miles an hour. Q. The other car, that you had the accident with, how fast was it going when it came in off Oakley? A. Well, it seemed to me about ten miles." The witness further testified that when he saw the other car coming in off of Oakley the witness was going about twenty miles an hour and he then slammed on his brakes; that he was then 23 or 24 feet east of Oakley; that "my car struck the center of the other gentleman's car on the left side;" that he did not see plaintiff's car stop at any time before the impact; that after the impact plaintiff's car moved a few inches but defendant's car did not move at all; that after the accident he did not go back to

car was on the west side of Oakley Street it started to make
the turn, when it came over to the east side of Oakley; that
when the witness was standing on the sidewalk looking across
plaintiff's car was over the sidewalk and to the
east side of Oakley Street. At the same time, the car was over to the
east side of Oakley Street, and the witness, who testi-
fied for defendant, stated that he was very close to the
intersection in the middle of the street, and
the car was heading west, and he was over the
bridge he was driving at a slow, cautious pace, and
that as he drove west on the north side of the intersection he
was probably still on the north side of the street;
that he saw, in the middle of the street, before the
accident. The following was the conversation: "I saw this
other car when you saw it, and it was heading west, and it was
off of Oakley. I saw it when you saw it, and it was
you saw it coming in off Oakley, in fact, it was
west, I would say, I think so, in fact, in fact,
Oakley, now that was it going west, well, and it was
west. The other car, that was it, and it was west, how
fast was it going when it came in off Oakley? Well, it
seemed to me about ten miles. The witness further testified
that when he saw the other car coming in off of Oakley the
witness was going about twenty miles an hour, and he then
slammed on his brakes; that he was then 25 or 30 feet east of
Oakley; that "my car struck the center of the other gentle-
man's car on the left side;" that he did not see plaintiff's
car stop at any time before the impact; that after the impact
plaintiff's car moved a few inches but defendant's car did not
move at all; that after the accident he did not go back to

work for Superb Cleaners, that when he did go back to work he took care of his son's church. Upon cross-examination the witness stated that when he was about twenty-four or twenty-five feet east of Oakley plaintiff's car was "coming in on Diversey." The following then occurred: "Q. Well, where was it with reference to the north curb? A. Well, he was coming in off from Oakley, in on the pavement, and I don't know just how many feet he could have been in. * * * Q. The front part of his car was in the intersection when you first saw it? A. Yes sir." The witness then testified that when he first saw plaintiff's car he applied the brakes and that his car went between thirty and thirty-five feet before the impact. "Q. Where was the front of his car with reference to the center line of Diversey Boulevard when the collision occurred? A. Well, he was perhaps a little bit in on the center of the one half. Q. What do you mean by that? A. I mean, travelling from the curb on Diversey, coming in on Diversey, he was about, I would say about in the center of the one half. Q. Do you mean by that that he was in the center of the north half of Diversey at the time the collision occurred? A. Very close." The witness then testified that the front part of his car was not "so badly damaged" by the impact but that he never saw the car in operation after the accident and did not know what became of it. The following then occurred: "Q. The front part of it [defendant's car] was pretty badly damaged in, was it not? A. I don't know. Q. The left side of that southbound automobile was caved in a good bit, was it not? A. I don't know how much."

The contention of defendants that plaintiff upon his own evidence was guilty of contributory negligence as a matter of law is without merit. If we judge plaintiff's conduct solely by his own evidence it appears to us that he was overcautious in not proceeding eastward at the time that he reached the

center line of Diversey avenue and the eastbound automobiles were still some distance away. The argument of defendants that plaintiff's failure to stop and to give defendant's car the right of way was a violation of the ordinances of the City of Chicago and constituted contributory negligence, cannot be based upon plaintiff's evidence. The same answer applies to the further contention of defendant that plaintiff was guilty of contributory negligence because he "cut the corner" in making a left turn into Diversey and thereby violated an ordinance of the City of Chicago and a statute of the State. Plaintiff testified that he stopped twice before entering Diversey avenue and that when he proceeded into Diversey avenue defendant's car was 600 feet east of Oakley. It is idle to argue that under such a state of facts plaintiff was obliged to let defendant's car pass before he entered Diversey avenue. Diversey avenue is a through street and the traffic upon it is heavy. If plaintiff had had to wait until there was no car within 600 feet of the intersection, he would in all probability have had to wait there a long time.

"The question of contributory negligence is one which is pre-eminently a fact for the consideration of the jury. In Thomas v. Buchanan, 357 Ill. 270, the court said,

"The question of due care on the part of the Plaintiff's intestate is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care on the part of the deceased.' We do not feel that the record in this case would warrant a Court in concluding that the decedent was guilty of contributory negligence as a matter of law. The question of who is entitled to right of way always involves determination as to relative speeds and distances of automobiles

center line of Diversey Avenue and the eastbound automobiles were still some distance away. The argument of defendant that Plaintiff's failure to stop and to give defendant's car the right of way was a violation of the ordinance of the City of Chicago and constitutes contributory negligence, cannot be based upon Plaintiff's evidence. The same answer applies to the further contention of defendant that Plaintiff was guilty of contributory negligence because he was the person in

making a left turn into Diversey and thereby violated an ordinance of the City of Chicago to not a distance of the State. Plaintiff testified that he stopped when he was waiting for Diversey Avenue and that when he proceeded into Diversey Avenue defendant's car was 600 feet east of Plaintiff. It is idle to argue that under such a state of facts Plaintiff was obliged to let defendant's car pass before he entered Diversey Avenue. Diversey Avenue is a through street and the traffic upon it is heavy. If Plaintiff had had to wait until there was no car within 600 feet of the intersection, he would in all probability have had to wait a long time.

"The question of contributory negligence as one which is predominantly a fact for the consideration of the jury. In Thomas v. Buchanan, 237 Ill. 230, the court said,

"The question of the facts on the part of the Plaintiff's intestate is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care on the part of the deceased. We do not feel that the record in this case would warrant a Court in concluding that the deceased was guilty of contributory negligence as a matter of law. The question of who is entitled to right of way always involves determination as to relative speeds and distances of automobiles

from the intersection. Kirchoff et al. v. Van Scoy, 301 Ill. App. 366. Unless the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of the jury. Blumb v. Getz, 366 Ill. 273." Wallace v. Farnell, 306 Ill. App. 310, 314.)

In support of their contention that "the finding that the defendants were negligent, implicit in the jury's verdict, is contrary to the manifest weight of the evidence," defendants argue that no witness corroborated plaintiff as to the manner of the accident, while Bjelland's testimony is corroborated by Freedman's testimony, and that in order to affirm this judgment we must hold that Freedman perjured himself. This court knows from long experience that honest witnesses frequently will differ as to what occurred at the time of an accident. In the case of People v. Hanisch, 361 Ill. 465, the supreme court, in passing upon a contention similar to the instant one, said (p. 468): "Whatever may be the rule in certain other jurisdictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgement of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury." The above statement in the Hanisch case has been cited with approval by the Supreme court and the Appellate courts. The judges of this court believe in the jury system and heartily approve the statement

from the intersection. Birchhoff et al. say that this

1. The first step is to identify the problem or question that needs to be answered.

19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853.

(2)

CONFIDENTIAL

SECRET

NAME: _____

It is the policy of the Department of Health and Human Services to ensure that all individuals who are eligible for the program are identified and that the program is administered in a manner that is consistent with the goals and objectives of the program.

Tháng 11 năm 1945, ông được cử làm Phó Chủ tịch Ủy ban Kháng chiến ở địa phương.

U.S. AIR FORCE, WASHINGTON, D.C. 20330-5000

THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TEXAS

Shirley Ann, I am not going to let you get hurt - not as

74 UNIT 10: THE HISTORY OF THE UNITED STATES

the judges would want the following information:

...to the fact that the ...

of atoms, molecules and of the atoms itself and of ymo ion

Uphold the sanctity of the trial by jury." This is the

in the Hantsch case has been cited with approval by the Supreme

court and the appellate courts, the judges of this court

believe in the jury system and heartily approve the statement

in the Hanisch case. The able and conscientious judge who tried this case approved the jury's verdicts. Moreover, there are facts in the case that strongly corroborate the testimony of plaintiff. Neither defendant Bjelland nor Freedman contradict plaintiff's statement that there were cars approaching from the west just prior to the accident. Plaintiff testified that defendant's car was going directly west and that it struck his car while it was standing still and facing directly south; that his left door and the left side of his car was caved in about a foot and a half and that defendant's automobile was dented at the front end; that defendant's car was coming straight ahead and never changed its speed. Freedman testified that defendant's automobile "kept going straight ahead, it didn't turn either way, prior to the impact. The front of the automobile that was westbound came in contact with the middle of the left side, right at the doors, of the car going south on Oakley, making the turn;" that the left side of plaintiff's automobile was dented in. Bjelland's testimony was to the effect that he went straight ahead; that "my car struck the center of the other gentleman's car on the left side;" that "my front end came in contact with his automobile." The undisputed evidence as to the condition of plaintiff's automobile after the impact strongly supports plaintiff's testimony, and rebuts Freedman's testimony that plaintiff's automobile at the time of the accident was facing southeast on a forty-five degree angle. Bjelland testified that when he first saw plaintiff the latter was "coming in off of Oakley," "just the front part of his car was in the intersection when I first saw him;" that he "was very close to the center of the north half of Diversey at the time the collision occurred." We find nothing in the testimony of Bjelland to support the testimony of Freedman that plaintiff's

in the Hough case. The only evidence in the case
tried this case proved the facts were correct.
there are facts in the case that show the
testimony of Plaintiff, I think favorable to the
defendant. The defendant's testimony is that
he was approaching from the east and to the
Plaintiff's testimony that he was approaching from the
west and that he was approaching from the east
and facing Plaintiff's car. The facts are that
side of his car was toward the east and the
defendant's automobile was facing the east.
The defendant's car was facing the east and the
Plaintiff's car was facing the east. The
"light going toward the east, the light from the east
to the light. The light from the east was toward
some in contact with the light from the east, light at
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that the light from the east was toward the
Plaintiff's testimony that the light from the east was toward
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Plaintiff's car. The light from the east was toward
southeast on a positive north angle. The light from the east was toward
that when he first saw Plaintiff's car was in the
off of Oakley." "Just the front part of his car was in the
intersection when I first saw him." That he was very close
to the center of the north half of highway at the time the
collision occurred." The fact nothing in the testimony of
Plaintiff to support the testimony of Defendant that Plaintiff's

car was making a turn to the east at the time of the accident and that the front of plaintiff's car was as far east as the east curb of Oakley.

After a careful consideration of the evidence in this case we are of the opinion that we would be usurping the functions of the jury to hold that the finding of the jury that defendants were negligent is contrary to the manifest weight of the evidence. Indeed, there is evidence in the record which, if the jury believed it, would have warranted a finding that Bjelland was guilty of gross negligence just before and at the time of the impact.

The judgment of the Superior court of Cook county entered January 6, 1944, is affirmed in toto.

JUDGMENT ENTERED JANUARY
6, 1944, AFFIRMED IN TOTO.

Sullivan, P. J., and Friend, J., concur.

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MANSFIELD TURNER and JANNIE TURNER,
Plaintiffs-Appellees,

v.

L. SINGLEMAN; MARY CRONIN; L. E.
BARTLETT, doing business as J. S.
BARTLETT & CO.,

Defendants.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

L. E. BARTLETT, doing business as
J. S. BARTLETT & CO., and L.
SINGLEMAN,

Defendants-Appellants.

321
328 1A. 263

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In a proceeding wherein plaintiffs prayed for the specific performance of an agreement between them and Mary G. Cronin for a warranty deed to certain real estate, Judge LaBuy entered a decree finding that the contract was in full force and effect and not forfeited or abandoned; that possession of the premises had been delivered by plaintiffs to Mary G. Cronin in May, 1933, at which time plaintiffs executed an assignment of rents to her and she was to apply the rents on the contract and the mortgage which incumbered the real estate, and when full payment had been made said Cronin was to redeliver possession of the real estate to plaintiffs and convey title to them; that Mary G. Cronin appointed L. E. Bartlett manager and agent of the real estate in the latter part of 1933 and he was to apply the net rentals on the contract and mortgage pursuant to said assignment; that from the date of said Bartlett's appointment he acted as manager and agent of the building; that in 1938 Mary G. Cronin quitclaimed the real estate to L. Singleman, defendant; that from rents collected Bartlett made payments on the \$1,000 mortgage on the property, reducing the mortgage to \$169.18; that plaintiffs made visits to the premises from time to time and to the office of Bartlett for the purpose of obtaining an accounting; that

MANUEL TURNER and JAMES TURNER
Plaintiffs-Appellants

v.

L. SINGELMAN; MARY GRONIN; I. E.
BARTLETT, doing business as I. E.
BARTLETT & CO.,
Defendants.

L. SINGELMAN; MARY GRONIN; I. E.
BARTLETT, doing business as
I. E. BARTLETT & CO., and I.
SINGELMAN,
Defendants-Appellants.

MR. JUSTICE SCHMIDT DELIVERED THE OPINION OF THE COURT.

In a proceeding wherein plaintiffs moved for the specific performance of an agreement between them and Mary G. Cronin for a warranty deed to certain real estate, Judge Lutz entered a decree finding that the contract was in full force and effect and not forfeited or abandoned; that possession of the premises had been delivered by plaintiffs to Mary G. Cronin in May, 1933, at which time plaintiffs executed an assignment of rents to her and she was to apply the rents on the contract and the mortgage which incumbered the real estate, and when full payment had been made said Cronin was to redeliver possession of the real estate to plaintiffs and convey title to them; that Mary G. Cronin appointed I. E. Bartlett manager and agent of the real estate in the latter part of 1933 and he was to apply the net rentals on the contract and mortgage pursuant to said assignment; that from the date of said Bartlett's appointment he acted as manager and agent of the building; that in 1938 Mary G. Cronin disclaimed the real estate to I. Singelman, defendant; that from rents collected Bartlett made payments on the \$1,000 mortgage on the property, reducing the mortgage to \$169.18; that plaintiffs made visits to the premises from time to time and to the office of Bartlett for the purpose of obtaining an accounting; that

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY

324.4.363

Bartlett had not accounted for rent receipts and disbursements during the time that he acted as agent. The decree provided, inter alia, "that if in the event the master finds that the rents collected from said premises by L. E. Bartlett doing business as J. S. Bartlett & Company, during the period he has managed same, have been sufficient to pay in full the contract balance and interest, taxes, mortgage indebtedness and interest and repair bills pertaining to said premises, the said L. Singleman shall quit claim all her right, title and interest in said premises to the plaintiffs, and in default thereof, the said master in chancery shall be directed to execute said quit-claim deed. * * * And said cause is hereby referred to * * * a master in chancery of this court to take an account of all the doings, dealings and acts of defendants L. Singleman and L. E. Bartlett doing business as J. S. Bartlett & Company, with all of the property described in the complaint and in the master's report, the rents accrued and collected and disbursements made thereof from time to time by the said L. E. Bartlett from the time he commenced to manage said premises in the latter part of 1933 to date." An order was entered on May 13, 1943, referring the cause to a master in chancery to take testimony of accounting and report conclusions of law and fact. The master filed a report that contained, inter alia, the following:

"Third: That the premises involved herein are located at 5120 South Dearborn Street, Chicago, Illinois, and are improved with a very old building which is in a more or less dilapidated condition.

"Fourth: In the Answer filed by defendant Bartlett prior to the entry of the Decree herein, he maintained that

"Fourth: In the answer filed by defendant Bartlett prior to the entry of the decree herein, he maintained that at 5120 South Dearborn Street, Chicago, Illinois, and are improved with a very old building which is in a more or less dilapidated condition.

he expended the aggregate sum of \$1395.25 for repairs and maintenance of the premises involved; the 'ledger sheets' and receipts submitted by Bartlett at the hearing of this cause showed a purported expenditure of \$1720.00. The work purportedly performed subsequent to the filing of the Answer amounted to \$181.50 therefore leaving an unexplained disbursement totaling \$134.00.

"Fifth: It was stipulated by the parties hereto that Bartlett collected the aggregate sum of \$3559.75 as rents from the premises herein involved for the period from the later part of 1933 to July 14, 1943, and that he has made the following disbursements, to-wit:

| | |
|-----------------------------|---------------|
| Miscellaneous expenses..... | \$ 8.50 |
| Mary G. Cronin..... | 9.00 |
| Insurance premium..... | 9.00 |
| Prin. Int. on Mgt..... | 1199.81 |
| Real Estate Commission..... | 177.20 |
| Water Taxes..... | <u>141.40</u> |

Total.....\$1545.70

It was further stipulated that there is a balance due on the contract as of June 26, 1932 the sum of \$607.00. Interest thereon from June 26, 1932 to July 14, 1943 amounts to \$400.62, making a total of principal and interest as of July 14, 1943 in the sum of \$1007.62.

"Sixth: In his attempt to sustain the alleged total expenditures of \$1720.00 L. E. Bartlett testified that he is in the real estate business and maintains an office for that purpose at 5111 South State Street; that he had been so engaged in the business continuously for the past fifty-four years; that he commenced operating and managing the premises involved herein from the later part of the year 1933; and that he ordered and checked all work before paying bills and knew work was done.

"(a) That his bookkeeper maintained a daily record in

he expended the agreed sum of \$11.45 for repairs and maintenance of the premises involved; the 11 repair sheets and receipts submitted by Plaintiff at the hearing of this cause showed a discrepancy of \$110.00. The Court reportedly granted an order to the taking of the Plaintiff's deposition in view of the foregoing. Plaintiff's deposition was taken on 11/11/01, at defendant's expense totaling \$1,400.

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work was done. he ordered and checked all work before paying bills and there involved herein from the latter part of the year 1935; and that years; that he commenced operating and managing the premises engaged in the business exclusively for the past fifty-four months of which time the great part of it has been as purpose of Bill Olin to the extent that it has been as in the real estate business and that he has an office for this expenditure of \$100,000.00. I think it is correct that he is at least in the vicinity of \$400,000.00 in the latter part of 1935.

"(a) That his bookkeeper maintained a daily record in

which she entered the current receipts and disbursements; that the entries of the daily record were subsequently posted on certain sheets designated as 'ledger sheets'; that he generally supervised the posting. He offered all of the 'ledger sheets' pertaining to the premises involved herein, as defendants collective Exhibit No. 1 of July 14, 1943. These were received in evidence subject to the objections raised by counsel for plaintiff.

"(b) He also offered in evidence a number of purported receipts for work and repairs which he contended were performed on the premises herein involved. These receipts are all on the stationery of J. S. Bartlett & Co. and are purportedly signed by the contractors who did the work. All of these receipts were offered in evidence as defendants collective Exhibit No. 2 and were received subject to the objection of the attorney for plaintiff.

"Seventh: The receipts (defendants collective Exhibit No. 2) were signed by a number of contractors and laborers. Only three of these parties appeared before the Master to testify. These three parties stated that their respective signatures appeared on the receipts; that they are their true and genuine signatures and were signed by them on the respective dates they received the money as evidenced by said receipts.

"Eighth: One, Frank Petrett, who testified that he signed some of the above receipts, was unable to give a detailed statement of the work performed by him on the premises herein involved. He, however, testified that he did remember constructing new posts under the building and raising the building and he received therefor the sum of \$150.00 which is fair and reasonable for the work so performed by him. He further testified

which she entered the current receipts and disbursements; that the entries of the daily record were approximately posted on certain sheets designated as "ledger sheets"; that he generally supervised the posting. He offered all of the "ledger sheets" pertaining to the premises involved during the time these were received collective Exhibit No. 1 of July 14, 1944. These were received in evidence subject to the objection that they were not identified.

"(b) He also offered in evidence a number of purported receipts for work and repairs which he contended were performed on the premises herein involved. These receipts are all on the stationery of T. J. S. and are purportedly signed by the contractor who did the work. All of these receipts were offered in evidence as documents collective Exhibit No. 2 and were received subject to the objection of the attorney for plaintiff.

Seventh: The receipts (documents collective Exhibit No. 2) were signed by a number of contractors and persons. Only three of these parties appeared before the court to testify. These three parties stated that their names and signatures appeared on the receipts; that they are their true and genuine signatures and were signed by them on the respective dates they received the money as evidenced by said receipts.

"Eighth: One, Frank Petrett, who testified that he signed some of the above receipts, was unable to give a detailed statement of the work performed by him on the premises herein involved. He, however, testified that he did remember contracting new posts under the building and raising the building and he received therefor the sum of \$150.00 which is fair and reasonable for the work so performed by him. He further testified

that he remodeled the porch and that a reasonable cost therefor was the sum of \$225.00 which he received from Bartlett. On cross-examination Petrett admitted that he could not read and was therefore unable to determine the contents of the receipts signed by him.

"Ninth: L. C. Gibbs, a contractor who testified on behalf of the plaintiffs, states that he had examined the premises involved herein shortly before appearing at the Master's hearing. That the porch is in a very neglected condition and is in dire need of repair; and that in his opinion no work had been performed on the porch for many years; excepting that a certain board had been nailed on to said porch by some of the tenants. Katie Pope who has been a tenant of the above described premises for the past three years, and whose husband has resided on the premises for the past six years, testified that considerable of the work which was claimed to have been done by Bartlett and the contractors who testified in his behalf had not been actually done. Among other things, she testified that the work alleged to have been done as set forth in the receipt dated December 13, 1940 (defendants collective Exhibit No. 2), was not actually performed; that all Bartlett did, was to furnish a faucet to her husband, who installed the same. She also testified that the work alleged to have been performed as set forth in the receipt dated May 19, 1942, (defendants collective Exhibit No. 2), was not actually performed; that it was even necessary for the tenant to purchase a bowl; that she had requested Bartlett to perform the work set forth in said receipt, but that Bartlett had refused and failed to do so.

"Tenth: From the competent testimony the Master is of the opinion and believes that the remodeling on the porch claimed to have been done by Bartlett and Petrett, was not

that he remodelled the porch and that a reasonable cost there-
for was the sum of \$22.00 which he received from Bartlett.
On cross-examination Bartlett testified that he could not read
and was therefore unable to determine the contents of the
receipts signed by him.

"Ninth: A. J. Gibbs, a contractor who testified on
behalf of the plaintiffs, stated that he had examined the
premises involved herein shortly before opening of the
Plaintiff's hearing. That the porch is in a very neglected con-
dition and is in dire need of repairs; and that in his opinion
no work had been performed on the porch for many years; and
testifying that a certain board had been nailed on to a 12 porch
by some of the tenants. That Gibbs has been a tenant
of the above described premises for the past three years,
and whose husband has resided on the premises for the past
six years, testified that considerable of the work which was
claimed to have been done by Bartlett and the contractors who
testified in his behalf had not been actually done. Among
other things, she testified that the work alleged to have been
done as set forth in the receipt dated November 12, 1940 (de-
fendants collective Exhibit No. 2), was not actually performed;
that all Bartlett did, was to furnish a receipt to her husband,
who installed the same. She also testified that the work
alleged to have been performed as set forth in the receipt
dated May 19, 1942, (defendants collective Exhibit No. 3),
was not actually performed; that it was even necessary for the
tenant to purchase a bowl; that she had requested Bartlett to
perform the work set forth in said receipt, but that Bartlett
had refused and failed to do so.

"Tenth: From the competent testimony the latter is of
the opinion and believes that the remodeling on the porch
claimed to have been done by Bartlett and Petreft, was not

actually performed by them or either of them; that in fact no remodeling work had been done on said porch for many years.

"Eleventh: James Albert Samuels, an electrical contractor, testified that he performed work on said premises during the years 1939 and 1942 and he received therefor the respective sums of \$25.00 and \$45.00.

"Twelfth: Bartlett claimed to have expended the sum of \$93.00 for court costs and attorney's fees in evicting certain tenants. From the competent evidence the Master believes and finds that said sum of \$93.00 was properly expended and that Bartlett should credit himself with that amount.

"Thirteenth: The bookkeeper who made the entries on the daily record and then posted the entries from the daily record to the 'ledger sheets' did not testify before the Master. The original record books were submitted to plaintiff's counsel for examination. On cross-examination Bartlett stated that he could not remember item for item the work caused to be performed by him on said premises.

"Fourteenth: The Master is of the opinion and believes that Bartlett has failed to substantiate most of the expenditures purportedly made by him. Bartlett did not explain why his bookkeeper could not appear to testify in open court. Many of the purported receipts produced by him were signed by parties who did not appear before the Master to testify as to the signatures and contents thereof. The three witnesses who did testify were on the whole ^{very} vague and indefinite in their statements.

"Fifteenth: As to the disputed amounts the Master is of the opinion and believes that only the following items should be credited to Bartlett, to-wit:

no remodeling work had been done on this house for many years and that the house was actually performed by them or under their supervision.

2129

—The following is a list of the names of the persons who have been interviewed in connection with the investigation of the case of the missing aircraft, and the results of the interviews.

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his bookkeeper could not appear to testify in court that

any of the suggested reasons for his going to the
by parties who did not appear before the
as to the signatures and contents thereof. The three wit-
nesses who did testify were on the whole ^{very} vague and indefinite
in their statements.

"Fifteenth: As to the disputed amount the Master is

of the opinion and believes that only the following items

should be credited to Bartlett, to-wit:

- | | | |
|-----------------------------|----------|----------|
| 1. Re-posting building..... | \$150.00 | |
| 2. Eviction costs..... | 93.00 | |
| 3. Electrical work..... | 70.00 | \$313.00 |

The Master cannot help but feel that other expenditures were made by Bartlett in maintaining the premises; however, the said expenditures have not properly been proved and therefore cannot be allowed.

"Sixteenth: The account of the parties hereto as of July 14, 1943 is therefore as follows:

- | | | |
|--|---------------|-----------|
| 1. Receipts..... | | \$3559.75 |
| 2. Expenditures | | |
| (a) As per stipulation.... | \$1545.70 | |
| (b) As per paragraph | | |
| Fifteenth..... | <u>313.00</u> | \$1858.70 |
| 3. Due on contract for principal and interest..... | | 1007.62 |
| | | <hr/> |
| | | \$2866.32 |
| 4. Balance due plaintiffs.... | | <hr/> |
| | | \$ 693.43 |

"Seventeenth: The Master therefore respectfully recommends that a Decree be entered herein in the nature of a judgment at law in favor of plaintiffs, Mansfield Turner and Jannie Turner and against the defendant L. E. Bartlett, doing business as J. S. Bartlett and Co. for the sum of \$693.43 and that execution issue therefor."

The chancellor, Judge Fisher, overruled the exceptions to the master's report and entered a decree in accordance with the recommendations of the master. Defendants L. E. Bartlett, doing business as J. S. Bartlett & Co., and L. Singleman, appeal.

In this court plaintiffs for the first time contended that the assignment of rents executed by plaintiffs to Mary G. Cronin, defendant, limited the duties of said Cronin to collecting rents and applying them on the mortgage and contract payments and that "any payments other than these are unauthorized;" that "she

| | | |
|----|--------------------------|--------------|
| 1. | Re-posting building..... | 12.00 |
| 2. | Victory coats..... | 2.00 |
| 3. | Electrical work..... | 11.00 |
| | | <u>25.00</u> |

The Master cannot help but feel that the figures were made by himself in maintaining his presence; however, the said expenditures have not only been proved and there-fore cannot be allowed.

Exhibit A: In support of the above items as

of July 24, 1941 in the case of the following:

| | | |
|----|--|--------------|
| 1. | Receipts..... | 11.75 |
| 2. | Expenditures
(a) as per statement..... | 12.00 |
| | (b) as per receipt..... | 11.00 |
| | <u>23.00</u> | |
| 3. | Due on contract for prin-
cipal and interest..... | 11.75 |
| | | <u>24.75</u> |
| 4. | Balance due plaintiffs.... | 11.43 |

"Seventeenth: The fact that the responsibility was placed that a Decree be entered herein in the name of a judgment at law in favor of plaintiffs, and in support of the same and against the defendant, the fact that the same was issued by the court for the sum of \$11.43 and that execution issue therefor."

The Chancellor, Judge Fisher, overruled the exceptions to the master's report and entered a decree in accordance with the recommendations of the master. Defendants E. E. Bartlett, doing business as E. E. Bartlett & Co., and E. E. Bartlett, appeal.

In this court plaintiffs for the first time contended that the assignment of rents executed by plaintiffs to Mary G. Cronin, defendant, limited the duties of said Cronin to collecting rents and applying them on the mortgage and contract payments and that "any payments other than these are unauthorized;" that "she

cannot go beyond the scope of this authority and bind her principal, unless the principal so agrees;" that "there is no evidence in the record that the plaintiffs so agreed. Therefore any payments or evidence of payments which Singleman made either personally or otherwise, for repairs or anything other than payments on the mortgage and contract, were made outside the scope of her authority and not binding upon the plaintiffs." Upon the oral argument plaintiffs' counsel admitted that there was no merit in the foregoing contention and that plaintiffs abandoned it. We might add that the decree of Judge LaBuy instructed the master to give defendants credit for "disbursements made thereof from time to time by the said L. E. Bartlett from the time he commenced to manage said premises in the latter part of 1933 to date." No appeal was taken by any of the parties from that decree.

It is apparent that the contention of plaintiffs, that Bartlett had no authority to make improvements and to pay for the same out of the moneys he collected, was advanced because defendants, in their brief, make it clear that the allowance by the master of \$220 for all repairs made upon the premises during the ten year period was utterly inadequate and that the evidence shows that the master should have allowed defendants \$1,720 for repairs and maintenance of the premises and for eviction costs. It would seem that the often repeated statements of counsel for plaintiffs to the effect that Bartlett appropriated to his own use a large part of the rents and profits which he had collected from the premises over a long period of years, and that to hide the appropriation he created false bills against the property for repairs, must have influenced the master's judgment. The uncontradicted evidence shows that the improvements on the premises consisted of a very

cannot go beyond the scope of this authority and bind her principal, unless the principal so agrees. That there is no evidence in the record that the plaintiff so agreed. Therefore any payments or evidence of payments which defendant made either personally or otherwise, for repairs or anything other than payments on the mortgage and interest, were made outside the scope of her authority and not binding upon the plaintiff. Upon the oral argument defendant's counsel admitted that there was no merit in the foregoing contention and that plaintiff's statement is. We will add that the decree of Judge Lacey instructed the master to give defendants credit for "disbursements" and to deduct from time to time by the said J. E. Bartlett from the time he commenced to manage said premises in the latter part of 1933 to date. No appeal was taken by any of the parties from that decree. It is apparent that the contention of plaintiff, that Bartlett had no authority to make improvements and to pay for the same out of the money he collected, was advanced because defendants, in their brief, made it clear that the allowance by the master of \$250 for all repairs made upon the premises during the ten year period was utterly inadequate and that the evidence shows that the master should have allowed defendants \$1,720 for repairs and maintenance of the premises and for eviction costs. It would seem that the often repeated statements of counsel for plaintiff to the effect that Bartlett appropriated to his own use a large part of the rents and profits which he had collected from the premises over a long period of years, and that to hide the appropriation he created false bills against the property for repairs, must have influenced the master's judgment. The uncontradicted evidence shows that the improvements on the premises consisted of a very

old frame building that required constant repairs to make it habitable; that it was difficult to keep tenants in the building that would pay the rent, and that every now and then it was necessary to evict a tenant. The amount claimed by defendants for repairs, \$1,720, seems at first blush to be too large, but it must be noted that the said amount covered a period of ten years. While the master allowed for repairs for that period only \$220, he stated in his report that he believed that Bartlett had made more expenditures than he was being allowed, and the master justified his allowance on the ground that certain expenditures had not been properly proved. The master states that many of the receipts produced by Bartlett were signed by parties who did not appear before the court to testify. Three contractors testified for defendants, Frank Petrett, James Albert Samuels and Andrew Steinbach. The charges made for the work done by these three contractors represented approximately eighty per cent of the total expenditures for repairs claimed by defendants, \$1,720. Defendant Bartlett testified that he had been in the real estate business for fifty-four years; that he was admitted to the bar in 1902; that he collected the rents from the building at 5120 South Dearborn street from the fall of 1933 to the date of the accounting; that by direction he rendered regular statements of moneys collected and expenditures made to Greenebaum Investment Company, who held the mortgage; that he ordered all of the repairs for the premises after he had decided that they were necessary, and that after they were made he checked the bills off and if they were correct he paid them. Defendants introduced in evidence receipts for all of the repairs claimed to have been made during the entire period save for two pieces of work done by James Albert Samuels,

old frame building that required some repairs to make it habitable; that it was difficult to keep tenants in the building that would pay the rent, and that they now and then it was necessary to visit a tenant. The amount claimed by defendants for repairs, \$1,750, seems to that claim to be too large, but it must be noted that the said amount covered a period of ten years. While the master allowed for repairs for that period only \$250, as set forth in his report that he believed that plaintiff had made some improvements and he was being allowed, and the master justified his allowance on the ground that certain improvements had not been proved. The master states that many of the receipts produced by plaintiff were signed by parties who did not appear before the court as testify. Three contractors testified for defendants, Frank Lettett, James Lettett, and Andrew Steinbach. The charges made for the work done by these three contractors represented approximately fifty per cent of the total expenditures for repairs claimed by defendants, \$1,750. Defendant Lettett testified that he had been in the real estate business for fifty-four years; that he was admitted to the bar in 1902; that he collected the rents from the building at 5120 South Dearborn Street from the fall of 1933 to the date of the accounting; that by inspection he reviewed regular statements of money collected and expenditures made to Greenbaum Investment Company, who held the mortgage; that he ordered all of the repairs for the premises after he had decided that they were necessary, and that after they were made he checked the bills off and if they were correct he paid them. Defendants introduced in evidence receipts for all of the repairs claimed to have been made during the entire period save for two pieces of work done by James Albert Samuels,

and as to said work the master found it had been done and allowed defendants credit for the same. The receipts offered purport to be signed by the contractors who did the work. Bartlett testified that he knew of his own knowledge that the repairs covered by the receipts were actually made; that he saw each of the receipts signed by the contractor who did the work; that the prices charged were fair and reasonable prices in Chicago at the time that the work was done. Plaintiffs objected to the admission of the receipts upon the ground that they did not believe that the receipts were made at the time that the work was done and that they questioned whether the work was done. The receipts were admitted in evidence.

Frank Petrett testified, for defendants, that he had been a general contractor for fifteen years; that he did repair work on the premises many times; that he keeps no record of the work he does. He identified twenty-five of the receipts that had been offered in evidence as receipts given by him to Bartlett when he was paid for work done. These receipts totaled \$890.35. He further testified that he did the work that was covered by the receipts; that he signed the receipts and got paid for his work, and that the charges made were very reasonable in Chicago at the time that the work was done. The witness went into some detail as to the work that he had done. He stated that he was an Italian and could not read English but could read figures and that when he signed a receipt Bartlett or the girl in the office would read the receipt to him.

Andrew Steinbach, testifying for defendants, stated that he was a general contractor in Chicago for eighteen years and that he did work at 5120 South Dearborn street upon orders from Bartlett; that after he finished the work and it

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was approved by Bartlett he was paid, and that he then signed receipts; that he did all the work stated in the receipts given by him and that the amounts charged were fair and reasonable; that thirty-four of the receipts offered by defendants bear his name and were signed by him. The witness testified in some detail as to certain work that he had done on the premises. The aggregate amount of the bills rendered by the witness is \$414.

James Albert Samuels, testifying for defendants, stated that he had done electrical work upon the premises upon two occasions; that for one job he charged \$45 and for another, \$25, and he was paid for the work. Receipts were not produced for work done by this witness, but the master found that the work was done and allowed defendants \$70 for the same.

The master found that "the original record books [of Bartlett] were submitted to plaintiffs' counsel for examination." Plaintiffs did not see fit to make use of the same.

Plaintiffs introduced as a witness Katie Pope, who testified that she had lived in the premises for the three years preceding her testimony; that Bartlett decorated "last year"; that since she has been there he decorated the ceiling, fixed holes in walls, calcimining, put paper on wall, painted woodwork; that in February, 1943, "he fixed holes in walls size of window panes, laths were falling. They were working two days and another man came in and did decorating. He papered four rooms and painted the fifth and bathroom;" that they put in two large window panes and five small ones, and that these were the only repairs that were made since she started to live in the building; that Bartlett gave her husband a faucet and her husband put it on himself; that there had been no split pipes or water pipes fixed; that in

her apartment the bowl burst and leaked all the time; that glass was put in windows two different times; that "water ran on a lady;" that the water "kept breaking." While the testimony of this witness shows that certain work was done during the time that she lived there, the master allowed nothing for that work.

Plaintiffs also called L. C. Gibbs, a contractor, and his evidence is stated by the master in his report, but we may add that his testimony was based upon hypothetical questions and it is, in our judgment, entitled to very little weight. Objections were sustained to proper questions put to the witness upon cross-examination. Neither of the plaintiffs testified although the decree entered by Judge LaBuy finds that they "made visits to the premises from time to time"; nor did they see fit to call anyone from the Greenebaum Investment Company, that had received regular statements from Bartlett, as to receipts and expenditures. As defendants argue, that Company was interested in the payment of the mortgage on the premises and would not be likely to tolerate fraudulent statements as to expenditures for repairs. It is difficult for us to understand upon what theory of fact or law the master based his findings. It is clear that he attached little, if any, weight to the receipts introduced by defendants and the testimony offered by them in reference to the receipts and the work covered by the same.

"* * * As between principal and agent, receipts given to the agent for payments made by him in his principal's business are competent evidence of the amounts paid. (Ballance v. Frisby, 2 Scam. 63; People v. Gerold, 265 Ill. 448; Given v. Gould, 39 Me. 410; Sherman v. Crosby, 11 Johns. 70.) A written receipt, if properly identified, is prima facie evidence of the truth of the recitals which it contains.

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written receipt, if properly identified, is prima facie evidence of the truth of the recitals which it contains.

(Jones on Evidence, -2d ed.- sec. 492.)" (People v. Davis, 269 Ill. 256, 272, 273. See, also, Finch v. Carlton, 249 Ill. App. 15, 18.)

"* * * The party may produce the vouchers in support of payments and the master is bound to admit them in evidence, but the other side can lay a reasonable ground to show that the vouchers in question can be impeached. The vouchers are prima facie proof of disbursements. (Birkholm v. Wardell, 42 N. J. Eq. 337; Halstead v. Tyng, 29 id. 86; 1 Ency. of Evidence, 145. See, also, 39 Cyc. 439, 499.) * * * Plaintiff in error testified before the master during the hearing that the vouchers were true and correct and that he received the vouchers and statements during the progress of the business and examined and checked them with reference to their accuracy. To require the plaintiff in error, when he made this offer, to bring the persons who signed the vouchers to testify to their genuineness, without some proof or something appearing on their face to indicate their lack of genuineness, would be most unreasonable. Such a rule in this case would have consumed a great amount of time in the taking of the testimony, to require which, so far as this record discloses, would be entirely unnecessary. * * * Plaintiff in error himself testified they were genuine, and there is no evidence in the record to contradict his testimony." (Wylie v. Bushnell, 277 Ill. 484, 495. See, also, Byales v. Matheson, 328 Ill. 269, 272; Cloyes v. Plattje, 231 Ill. App. 183, 191, 193.)

After a careful review of the evidence we are satisfied that the finding of the master and the finding in the decree that there was a balance due plaintiffs from defendants of \$693.43 is not warranted by the evidence. In our judgment defendants should be allowed \$1,720 for repairs made upon the

[illegible]

REGARDING THE "BOMBING" OF THE "MARTIN LUTHER KING, JR. BUILDING"

10 JUL 1962

Approved for Release by NSA on 08-25-2014 pursuant to E.O. 13526

of Justice and the Department of Education, and others of

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beholden and on the other side to deliver interest a profit.

that the findings of the case are not to be limited to that

that there was a balance due Plaintiff from Defendant of

\$693.43 is not warranted by the evidence. In our judgment,

Defendants should be allowed \$2,750 for repairs made upon the

building during the ten year period and that there is a balance due defendant L. Singleman from plaintiffs of \$806.57. In his report the master seems to attach importance to the fact that in the answer filed by defendant Bartlett to the complaint he stated that he expended the aggregate sum of \$1,395.25 for repairs and maintenance of the premises involved, but that the receipts submitted by Bartlett at the hearing showed a purported expenditure of \$1,720, that the work purportedly performed subsequently to the filing of the answer amounted to only \$181.50, leaving an unexplained disbursement totaling \$134. We are satisfied that the evidence shows that the repairs made subsequently to the time of the filing of the answer amounted to \$290.50; that an item of repair work for \$25 done by Samuels prior to the filing of the answer had been omitted in the computation of repairs to February 1, 1942. The master found that Samuels had done the work covered by this item and the master allowed the item. There was also evidence to show that two small items, \$5.50 and \$3.75, for repairs done before the filing of the answer had been omitted in computing the building repairs to February 1, 1942.

The decree of the Circuit court of Cook county is reversed, and the cause is remanded with directions to the trial court to find that there is due from plaintiffs to L. Singleman, defendant, the sum of \$806.57 and that if the said amount is paid by plaintiffs in thirty days defendant L. Singleman should convey the premises to plaintiffs by warranty deed, and that in default of said conveyance the master convey the same to plaintiffs, and that if plaintiffs should default in the payment of said sum of \$806.57 they should be deprived of their right, title and interest in and to said real estate.

DECREE REVERSED, AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

Sullivan, P. J., and Friend, J., consent.
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sum of \$800.00 they should be deprived of their right, title and
and that if plaintiffs should default in the payment of said
of said conveyance the master convey the same to plaintiffs,
the premises to plaintiffs by way of deed, on that in default
plaintiffs in thirty days defendant. Plaintiff should convey
and, the sum of \$800.00 and that if the said amount is paid by
find that there is no wrong done to the defendant, defendant
and the cause be remitted with directions to the trial court to
The decree of the circuit court of Cook County be reversed,
February 1, 1942.

43269

LAURA L. DOLL,

Appellee,

v.

CONTINENTAL ILLINOIS NATIONAL
BANK AND TRUST COMPANY OF
CHICAGO, Executor of the Last
Will and Testament of Charles
T. Stevens, Deceased; DR. B. L.
STEVENS and RUBY LONGLEY,
Appellants.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a decree entered after the report of Master in Chancery Leonard C. Reid (now Judge Reid), to whom the cause had been referred, had been filed and approved. The decree found, inter alia, that about May 2, 1934, Laura L. Doll, plaintiff, and the deceased, Charles T. Stevens, entered into a contract by which plaintiff was to render certain personal services to the deceased, as set forth in the complaint, for which services the deceased was to pay plaintiff by executing his last will and testament whereby she would be paid from his estate the sum of \$1,000 a year for the rendition of said services; that plaintiff upon the making of the contract entered upon the performance thereof and thereafter performed the same until the death of deceased, on March 10, 1943, and rendered to the deceased the services provided for in the agreement; that pursuant to the agreement Stevens executed, on May 2, 1935, his certain codicil to his last will and testament, dated May 16, 1928, by which codicil he gave and bequeathed to plaintiff \$1,000; that on September 16, 1936, pursuant to the agreement, he made and published another codicil to his said last will and testament, by which codicil he bequeathed to plaintiff \$2,000; that on June 4,

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17. That the Plaintiff, in the year 1934, was advised by the deceased, Charles A. Stevens, that he had a contract with the Plaintiff for the performance of certain personal services to be rendered to the deceased, and that the Plaintiff was to be paid for the performance of said services the sum of \$1,000 a year for the term of said contract; that the Plaintiff, upon the making of the contract, entered upon the performance thereof, and thereafter performed the same until the death of the deceased, on March 10, 1943, and rendered to the deceased the services provided for in the agreement; that pursuant to the agreement Stevens executed, on May 2, 1935, his certain codicil to his last will and testament, dated May 15, 1935, by which codicil he gave and bequeathed to the Plaintiff \$1,000; that on September 16, 1936, pursuant to the agreement, he made and published another codicil to his said last will and testament, by which codicil he bequeathed to the Plaintiff \$2,000; that on June 4,

1937, he made, executed and published another codicil to his said last will and testament by which he bequeathed to plaintiff \$3,000; that on July 1, 1938, he made another codicil to his said last will and testament by which he bequeathed to plaintiff \$4,000; that on July 11, 1938, he made and published another codicil to said last will and testament by which he bequeathed to plaintiff \$4,000; that on September 14, 1942, he executed his last will and testament by which he bequeathed to plaintiff \$5,000; that on March 9, 1943, the deceased executed his further^{last}/will and testament, revoking all other wills by him ever made and by which he wholly failed to carry out his agreement with plaintiff; that said last will and testament was admitted to probate in the Probate court of Cook county on June 1, 1943, and letters testamentary were issued to the Continental Illinois National Bank and Trust Company of Chicago, which is now the acting executor of said will. The decree finds that by reason of the death of the deceased the court cannot decree specific performance of the contract, but orders, adjudges and decrees that on the whole assets of the estate of the deceased that are now or may hereafter come into the possession of said bank as said executor, "the Court does hereby impress a trust in favor of the plaintiff, Laura L. Doll, for the sum of \$8853.72 together with the master's costs herein fixed in the sum of \$428.90, and for said sums the said Laura L. Doll is hereby given a first and prior lien upon said assets subject, however, to the rights of the creditors of said estate and costs and expenses of the administration thereof. It Is Therefore Ordered * * * that the Continental Illinois National Bank and Trust Company of

Continental Illinois National Bank and Trust Company of

Chicago, as Executor of the Last Will and Testament of Charles T. Stevens, deceased, in due course of administration of said estate pursuant to this decree, pay to the plaintiff Laura L. Doll, said sum of \$8853.72 plus the master's costs herein fixed in the sum of \$428.90."

The following is the report of the master in chancery:

"* * *

"From the pleadings and the evidence submitted, I find as follows:

"1:- That the Court has jurisdiction of the parties and of the subject matter.

"2:- Laura L. Doll, plaintiff herein, filed her complaint in chancery wherein she seeks to compel Continental Illinois National Bank and Trust Company of Chicago, Executor of the Last Will and Testament of Charles T. Stevens, deceased, Dr. B. L. Stevens and Ruby Longley, defendants, to specifically perform an alleged contract or agreement entered into between the plaintiff and Charles T. Stevens, deceased, whereby Charles T. Stevens is said to have agreed with Laura L. Doll, plaintiff, that if she would give him personal care and attention, including cleaning his clothing, washing his shirts and collars, cooking meals for him, accompanying him about, reading to him, acting as his errand messenger, driving him about in his car, and being his companion as long as he should live, that he would make his Will and provide therein that she would be paid from his estate the sum of \$1,000.00 per year for the rendition of said services.

"3:- It appears from the evidence that on May 2, 1935, Charles T. Stevens made, executed and published his certain codicil to his Will bearing date of May 16, 1928, in and by which said codicil he provided:

"WHEREAS, I now desire to dispose of any automobile

Chicago, as executor of the last will and testament of Charles T. Stevens, deceased, in due course of administration of said estate pursuant to this decree, pay to the plaintiff Laura E. Bell, said sum of \$25,000.00 plus the master's costs herein taxed in the sum of \$12.75."

The following is the report of the master in chancery:

"* * *

"From the pleadings and the evidence submitted, I find

as follows:

"1:- That the court has jurisdiction of the parties and

of the subject matter.

"2:- Laura E. Bell, plaintiff herein, filed her complaint

in chancery wherein she seeks to compel Continental Illinois National Bank and Trust Company of Chicago, executor of the last will and testament of Charles T. Stevens, deceased, to pay to her and Froy Douglas, defendants, to specifically perform an alleged contract or agreement entered into between the plaintiff and Charles T. Stevens, deceased, whereby Charles T. Stevens is said to have agreed with Laura E. Bell, plaintiff, that if she would give him personal care and attention, including cleaning his clothing, washing his shirt and collar, cooking meals for him, accompanying him about, reading to him, acting as his errand messenger, driving him about in his car, and being his companion as long as he should live, that he would make his will and provide therein that she would be paid from his estate the sum of \$1,000.00 per year for the rendition of said services.

"3:- It appears from the evidence that on May 2, 1928,

Charles T. Stevens made, executed and published his certain codicil to his will bearing date of May 16, 1928, in and by

which said codicil he provided:

"WHEREAS, I now desire to dispose of my automobile

which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequeath to the same LAURA DOLL the sum of ONE THOUSAND DOLLARS (\$1000.00), and to confirm my said will, except as to such change as it may affect any of the devises or bequests which I have in my said will heretofore made.

"NOW, THEREFORE, I hereby declare that my gifts, devises, and bequests in my aforesaid will of May 16, A. D. 1928, be taken to have been changed by the gift of the said automobile and the sum of One Thousand Dollars (\$1000.00) to LAURA DOLL, but not further or otherwise, and to have been in all other respects confirmed.

"I now, therefore, give and bequeath to the said LAURA DOLL any automobile which I may own at the time of my death, and the sum of ONE THOUSAND DOLLARS (\$1000.00) cash. And I do hereby ratify and confirm my said will in every other respect."

"That on September 16, 1936, Charles T. Stevens made, executed and published another codicil bearing that date to his Will bearing date of May 16, 1928, in and by which codicil he provided:

"WHEREAS, I now desire to dispose of any automobile which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequeath to the same LAURA DOLL the sum of TWO THOUSAND DOLLARS (\$2000.00), and to confirm my said will, except as to such change as it may affect any of the devises or bequests which I have in my said will heretofore made,

"NOW, THEREFORE, I hereby declare that my gifts, devises, and bequests in my aforesaid will of May 16, A. D. 1928, be taken to have been changed by the gift of the said automobile and the sum of Two Thousand Dollars (\$2000.00) to

which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequeath to the same LAURA DOLL the sum of ONE THOUSAND DOLLARS (\$1000.00), and to confirm my said will, except as to such change as it may affect any of the devisees or bequests which I have in my said will heretofore made.

"NOW, THEREFORE, I hereby declare that my gifts, devisees, and bequests in my aforesaid will of May 16, A. D. 1928, be taken to have been changed by the gift of the said automobile and the sum of One Thousand Dollars (\$1000.00) to LAURA DOLL, but not further or otherwise, and to have been in all other respects confirmed.

"I now, therefore, give and bequeath to the said LAURA DOLL my automobile which I may own at the time of my death, and the sum of ONE THOUSAND DOLLARS (\$1000.00) cash. And I do hereby ratify and confirm my said will in every other respect."

"That on September 16, 1928, Charles F. Stevens made, executed and published another codicil bearing that date to his will bearing date of May 16, 1928, in and by which codicil he provided:

"WHEREAS, I now desire to dispose of my automobile which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequeath to the same LAURA DOLL the sum of TWO THOUSAND DOLLARS (\$2000.00), and to confirm my said will, except as to such change as it may affect any of the devisees or bequests which I have in my said will heretofore made,

"NOW, THEREFORE, I hereby declare that my gifts, devisees, and bequests in my aforesaid will of May 16, A. D. 1928, be taken to have been changed by the gift of the said automobile and the sum of Two Thousand Dollars (\$2000.00) to

LAURA DOLL, but not further or otherwise, and to have been in all other respects confirmed.

"I NOW, THEREFORE, give and bequeath to the said LAURA DOLL any automobile which I may own at the time of my death, and the sum of TWO THOUSAND DOLLARS (\$2000.00) cash. And I do hereby ratify and confirm my said will in every other respect.'

"That on June 4, 1937, Charles T. Stevens made, executed and published another codicil bearing that date to his Will bearing date of May 16, 1928, in and by which codicil he provided:

"WHEREAS, I now desire to dispose of any automobile which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequeath to the same LAURA DOLL the sum of THREE THOUSAND DOLLARS (\$3000.00), and to confirm my said will, except as to such change as it may affect any of the devises or bequests which I have in my said will heretofore made,

"NOW, THEREFORE, I hereby declare that my gifts, devises and bequests in my aforesaid will of May 16, A. D. 1928, be taken to have been changed by the gift of the said automobile and the sum of Three Thousand Dollars (\$3000.00) to LAURA DOLL, but not further or otherwise, and to have been in all other respects confirmed.

"I now, therefore, give and bequeath to the said LAURA DOLL any automobile which I may own at the time of my death, and the sum of THREE THOUSAND DOLLARS (\$3000.00) cash. And I do hereby ratify and confirm my said will in every other respect.'

"That on July 1, 1938, Charles T. Stevens made, executed and published another codicil bearing that date to his Will bearing date of May 16, 1928, in and by which codicil he

provided:

"WHEREAS, I now desire to dispose of any automobile which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequeath to the same LAURA DOLL the sum of Four Thousand Dollars (\$4000.00), and to confirm my said will, except as to such change as it may affect any of the devises or bequests which I have in my said will heretofore made,

"NOW, THEREFORE, I hereby declare that my gifts, devises, and bequests in my aforesaid will of May 16, A. D. 1928, to be taken to have been changed by the gift of the said automobile and the sum of Four Thousand Dollars (\$4000.00) to LAURA DOLL, but not further or otherwise, and to have been in all other respects confirmed.

"I now, therefore, give and bequeath to LAURA DOLL, at present residing at 1062 Thorndale Avenue, Chicago, Illinois, who by many words and acts of kindness and sympathy encouraged me when I was heavily burdened by sorrow and ill health, any automobile which I may own at the time of my death, and the sum of Four Thousand Dollars (\$4000.00) cash. And I do hereby ratify and confirm my said will in every other respect.'

"That on July 11, 1938, Charles T. Stevens made, executed and published another codicil bearing that date to his Will bearing date of May 16, 1928, in and by which codicil he provided:

"WHEREAS, I now desire to dispose of any automobile which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequeath to the same LAURA DOLL the sum of Four Thousand Dollars (\$4000.00), and to confirm my said will, except as to such change as it may affect any of the devises or bequests which I have in my

provided:

"WHEREAS, I now desire to dispose of any automobile which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequest to the same LAURA DOLL the sum of Four Thousand Dollars (\$4000.00), and to confirm my said will, except as to such change as it may affect any of the devisees or bequests which I have in my said will heretofore made,

"AND, WHEREAS, I hereby declare that my gifts, devisees, and bequests in my aforesaid will of May 16, A. D. 1938, to be taken to have been changed by the gift of the said automobile and the sum of Four Thousand Dollars (\$4000.00) to LAURA DOLL, but not further or otherwise, and to have been in all other respects confirmed,

"I now, therefore, give and bequest to LAURA DOLL, at present residing at 1602 Thornfield Avenue, Chicago, Illinois, who by many words and acts of kindness and sympathy encouraged me when I was heavily burdened by sorrow and ill health, any automobile which I may own at the time of my death, and the sum of Four Thousand Dollars (\$4000.00) cash. And I do hereby ratify and confirm my said will in every other respect."

"That on July 11, 1938, Charles T. Stevens made, executed and published another codicil bearing that date to his will bearing date of May 16, 1938, in and by which codicil he provided:

"WHEREAS, I now desire to dispose of any automobile which I may own at the time of my death by bequest of the same to LAURA DOLL, and to give and bequest to the same LAURA DOLL the sum of Four Thousand Dollars (\$4000.00), and to confirm my said will, except as to such change as it may affect any of the devisees or bequests which I have in my

said will heretofore made,

"NOW, THEREFORE, I hereby declare that my gifts, devises, and bequests in my aforesaid will of July 11, A. D. 1938, (of even date herewith) be taken to have been changed by the gift of the said automobile and the sum of Four Thousand Dollars (\$4000.00) to LAURA DOLL, but not further or otherwise, and to have been in all other respects confirmed.

"I now, therefore, give and bequeath to LAURA DOLL, at present residing at 1062 Thorndale Avenue, Chicago, Illinois (who by many words and acts of kindness and sympathy encouraged me when I was heavily burdened by sorrow and ill health), any automobile which I may own at the time of my death, and the sum of Four Thousand Dollars (\$4000.00) cash. And I do hereby ratify and confirm my said will in every other respect.'

"That on September 14, 1942, Charles T. Stevens executed his Last Will and Testament expressly thereby revoking all wills and codicils theretofore made and providing therein, inter alia:

"ARTICLE II

"I give and bequeath unto LAURA DOLL, now residing at 1062 Thorndale Avenue, Chicago, Illinois, the sum of FIVE ^{DOLLARS} THOUSAND/(\$5000.00), to her own use and control absolutely.'

"That on, to-wit, March 9, 1943, Charles T. Stevens executed his further Last Will and Testament wherein he expressly revoked all wills and codicils by him made, and by said Last Will and Testament nominated the Continental Illinois National Bank and Trust Company of Chicago executor thereof and devised and bequeathed all of his property, after the payment of his debts and the expenditure not to exceed One Thousand Dollars (\$1000.00) for the care and maintenance of certain graves, to the defendants, DR. B. L. STEVENS and RUBY LONGLEY.

said will hereafter make,

"THAT on September 14, 1944, the said

deceased, and deceased in my possession with the said

1938, (or even later) the said deceased

by the gift of the said deceased and the said

Dollars (\$400.00) to the said deceased, but not further or otherwise,

and to have been in all other respects

"I now, therefore, give and bequeath to the said

present residing at 1008 North La Salle Avenue, Chicago, Illinois

(who by many words and acts of kindness and sympathy encouraged

me when I was heavily burdened by sorrow and grief, and

automobile which I now own at the time of my death, and the

sum of Four Thousand Dollars (\$4,000.00) cash, and I do hereby

ratify and confirm my said will in every other respect."

"That on September 14, 1944, the said

his last will and testament and especially thereby revoking all

will and codicils thereto made and providing therein,

inter alia:

"I do hereby

"I give and bequeath unto the said

1008 North La Salle Avenue, Chicago, Illinois, the sum of FIVE

DOLLARS (\$500.00), to her and her heirs and assigns absolutely."

"That on, to-wit, March 2, 1945, the said

executed his further last will and testament wherein he ex-

pressly revoked all wills and codicils by him made, and by

said last will and testament provided that the said

Illinois National Bank and Trust Company of Chicago executor

thereof and devised and bequeathed all of his property, after

the payment of his debts and the expenditure not to exceed One

Thousand Dollars (\$1000.00) for the care and maintenance of

certain graves, to the defendants, DR. B. L. STEVENS and EUBY

LONGLEY.

"4:- * * *

"5:- Martha Mott, a witness for the plaintiff, testified that in the month of September, 1942, at the request of Charles T. Stevens, she made a typed copy of his Last Will and Testament dated September 14, 1942, so that Laura L. Doll would have it in her possession. She further testified that Charles T. Stevens said that he thought Laura was more deserving of the amount of money that he left than any of his relatives and that he thought she had given him the services and that she would receive his income or what he had left after he had died, and he wanted her to have a copy of that Will; that she had done a nice job of taking care of him while he was living, had been nicer than any of his relatives had been, had washed and ironed and gotten meals for him. She further testified that Stevens told her he had made several wills in the past and was putting \$1000.00 each year in the will.

"6:- Charles M. Harvey, a witness for the plaintiff, testified that in the Fall of 1942 Charles T. Stevens told him that he was going to see that Laura Doll was properly paid for the service she rendered in driving the car and otherwise, social. He testified that Stevens referred to Laura Doll as his niece.

"7:- Daisy Cannon, a witness for the plaintiff, testified that in the Fall of 1939 Stevens told her, in the presence of Laura Doll, that he did not know what he would have done without Miss Doll, after the time of his wife's death, he was very depressed and he did not know what he would have done without Miss Doll's help; that she certainly brought him back to life and took care of him and looked after him like his own daughter would; that his relatives had deserted him, that no one came to see him, and that Miss Doll looked after him right along and did so many things for him that he was going to show his appreciation

by seeing that she was taken care of; that he mentioned that he had made an agreement to leave her a thousand dollars a year and would see that she got a thousand dollars every year after that as long as he lived; that he wanted her to be taken care of for what she had done for him; that he thought so much of her that he called her his niece; that he thought so much of her that he just wanted to do something for her, and he wanted me to know it; that Miss Doll used to do his laundry and take him things when he was ill. She further testified that in the summer of 1942 in Miss Doll's apartment, in the presence of Laura Doll, Stevens said that he appreciated so much what his niece was doing for him that he did not know how he would have gone on living without her companionship and help. She testified that she had seen Laura Doll and Stevens together several dozen times, either at her apartment or at his hotel.

"8:- Eleanor Shucker, a witness for the plaintiff, testified that she first met Laura Doll in August, 1935, at Deutsch's Restaurant where Laura Doll was employed as a cashier, and that after August, 1935, they became very good friends. She testified that she first met Charles Stevens when Laura Doll introduced her to him in June, 1937, at a dinner party in Laura Doll's apartment. She testified that Laura Doll had been steadily employed since 1935; that she was invited to Laura's apartment at least once or twice a month for dinner and at least every other time Stevens was present for dinner also. She testified that in June, 1937, Stevens told her that he had agreed with Miss Doll that if she looked after him and acted as a companion, he being all alone in the world and being an old man and he had no one else, he would pay her \$1000.00 every year that he lived, as long as Miss Doll would act as his companion solely and look after him. She testified that Stevens told her that Laura was the only person that had any

by seeing that she was taken care of; that in mentioned that
he had made an agreement to leave her a thousand dollars a
year and would see that she got a thousand dollars every year
after that as long as he lived; that he wanted her to be taken
care of for what she had done for him; that he thought so much
of her that he called her his niece; that he thought so much
of her that he just wanted to do something for her, and he
wanted me to know it; that that old man used to go to his laundry and
take his things when he was ill, the first testified that in
the summer of 1948 in this old apartment, in the presence of
Laura Doll, Stevens said that he was related to much what his
niece was doing for him and he did not know how he would have
gone on living without her relationship and help. The testi-
fied that she had seen Laura Doll and Stevens together several
dozen times, either at her apartment or at the hotel.
"8:- Witness, a witness for the plaintiff,
testified that she first met Laura Doll in August, 1937, at
Dontsch's Restaurant where Laura Doll was employed as a cashier,
and that after August, 1937, they became very good friends.
She testified that she first met Charles Stevens when Laura
Doll introduced her to him in June, 1937, at a dinner party in
Laura Doll's apartment. She testified that Laura Doll had been
steadily employed since 1937; that she was invited to Laura's
apartment at least once or twice a month for dinner and at
least every other time Stevens was present for dinner also.
She testified that in June, 1937, Stevens told her that he had
agreed with Miss Doll that if she looked after him and acted
as a companion, he being all alone in the world and being an
old man and he had no one else, he would pay her \$1000.00 every
year that he lived, as long as Miss Doll would act as his
companion solely and look after him. She testified that
Stevens told her that Laura was the only person that had any

interest in him since the loss of his wife, and inasmuch as he had no one else that he could rely upon and was not in a position to hire a nurse or constant companion that he would have to pay weekly, that he agreed to leave her this \$1000.00 a year and increase the amount each year, that that would do her more good than to pay her a small weekly sum, and that inasmuch as Laura was capable and employed and worked every day and could look after herself, he preferred leaving the money in one sum. She testified that Laura Doll drove Stevens to any place he wanted to go when her time was permissible, and when she was unable to cook in her own apartment she had dinner out with Stevens; that on many occasions she was invited along to eat out with them, and on such occasions Laura drove the car. She testified that Laura Doll wrote letters for Stevens, took care of his personal apparel, read to him and ran errands for him. She further testified that Stevens told her that he preferred to refer to Miss Doll as his niece due to the fact there were so many years difference in their ages and he didn't want people to misunderstand; that while he had a living niece and nephew, at no time had they given him any thought whether he lived or died, that he wouldn't have known what to do without Miss Doll to look after him. She also testified that Stevens told her in 1937 that he had given Laura a copy of each new codicil which was made so that they would be her protection and that he had the originals. She also testified that Laura Doll brought food twice a week to Mr. Stevens and that he ate in restaurants the other five nights unless he ate with Laura Doll in her apartment. She testified that Laura used to bring his laundry back from his apartment and do it along with her own. She testified that Laura Doll and Stevens exchanged presents on birthdays and Christmas.

interest in him since the 10th of his wife, and inasmuch as
he had no one else that he could rely upon and was not in a
position to have a trust or constant company that he would
have to pay weekly, that he agreed to have her this \$500.00
a year and increase the same each year, that she would do
her more good than to pay her a small weekly sum, and that
inasmuch as Laura was capable and capable and worked every
day and could look after a household, he preferred leaving the
money in one sum. He testified that Laura Doll drove Stevens
to any place he wanted to go when her time was permissible, and
when she was unable to cook in her own apartment she had dinner
out with Stevens; that on many occasions she was invited along
to eat out with them, and on such occasions Laura drove the
car. He testified that Laura Doll wrote letters for Stevens,
took care of his personal affairs, read to him and ran errands
for him. He further testified that Stevens told her that
he preferred to refer to her as Doll as his name was to the
fact there were so many years difference in their ages and he
didn't want people to misunderstand; that while he had a living
niece and nephew, at no time had they given him any thought
whether he lived or died, that he wouldn't have known what to
do without Mrs Doll to look after him. He also testified
that Stevens told her in 1937 that he had given Laura a copy
of each new codicil which was made so that they would be her
protection and that he had the originals. He also testified
that Laura Doll brought food twice a week to Mr. Stevens and
that he ate in restaurants the other five nights unless he
ate with Laura Doll in her apartment. He testified that
Laura used to bring his laundry back from his apartment and
do it along with her own. He testified that Laura Doll
and Stevens exchanged presents on birthdays and Christmas.

"9:- Howard D. Moore, a witness for the plaintiff, testified that he first met Laura Doll shortly after Easter, 1942, and first met Stevens in June, 1942, at Laura Doll's apartment where he was having dinner. He testified that in July, 1942, he drove Laura Doll and Stevens out into the country in his car, at which time Stevens explained to him that Miss Doll was not his niece and that her reason for calling him Uncle Charlie was merely a term of address; that his wife had died suddenly some years before and he was left without any relatives that were interested in him; that he met Miss Doll where she was working and took her to a movie and explained to her his situation which is, 'I am a lonely old man;' that he had made an agreement with her to see that she was taken care of if she would continue looking after him and attending to whatever small wants he might have; that the agreement was such that Miss Doll would not receive anything while he was alive but he would leave her a thousand dollars for every year that he lived; that he had made new wills every year with this provision; that she cooked for him on several occasions, that she drove the car, that she would take him out into the country on rides evenings and Sundays, that she would even do his laundry.

"10:- Dr. Gerritt ^{Cotts,} a witness for the defendants, testified that he had known Charles Stevens ten or twelve years before his death; that he saw Stevens practically every day from January 13, 1943, up to March 10, 1943, the date of his death; that at one time Stevens inquired about his bill and told him it was a little high; that he had a lot of expenses and said he wouldn't have much money and would like to have me cut the bill because he was shy of money; that he gave Miss Doll a little money once in a while; that Stevens told him that

"I am a witness for the plaintiff, testimony that he first met Stevens after Stevens' death, and that Stevens was living in a small apartment where he was having dinner. He testified that in July, 1943, he drove Stevens and Stevens out into the country in his car, at which time Stevens explained to him that Stevens was not his niece and that his reason for calling her Stevens was merely a form of address; that his wife had been married some years before and he was left without any relatives that were interested in him; that he met Stevens some time ago and Stevens had told her to a movie and explained to him his situation when he said 'I am a lonely old man'; that he had made an agreement with her to see that she was taken care of if she would continue looking after him and attending to whatever small wants he might have; that the agreement was that Stevens would not receive anything while he was alive but he would leave her a thousand dollars for every year that he lived; that he had made now will every year with this provision that she would look after him on several occasions, that she drove the car, that she would take him out into the country on rides evenings and Sundays, that she would even do his laundry.

"I am a witness for the defendant, testimony that he had known Charles Stevens ten or twelve years before his death; that he saw Stevens practically every day from January 13, 1943, up to March 10, 1943, the date of his death; that at one time Stevens inquired about his bill and told him it was a little high; that he had a lot of expenses and said he wouldn't have much money and would like to have me out the bill because he was shy of money; that he gave Stevens a little money once in a while; that Stevens told him that

Miss Doll would come to see him at the hospital.

"11:- David Skooglund, a cafeteria and hotel man, witness for the defendants, testified that he had known Charles Stevens for twelve or fifteen years; that when his wife was living he saw him in his restaurant every day, and that after her death Stevens ate in his restaurant at least once a day, when he was not out of the city; that after he gave up his job with the railroad and retired he ate in his restaurant quite often, mostly for breakfast and his supper, and most of the time about twice a day.

"12:- Ernest A. Eklund, a witness for the defendants, and an attorney, testified that he first met Charles Stevens about May 2, 1935, when he drew a codicil to his Will. He testified that Stevens told him that he wanted to give a Thousand Dollars to Laura Doll and that he had some doubt in his mind as to how it should be done, and that the codicil was afterwards drawn without any further reasons for his giving the Thousand Dollars; that Stevens discussed with him the reason he wanted to have something in his Will as to why he should give Laura Doll this money; that the folks down in his home town, and other people that he knew, might have some objection to his having given this Thousand Dollars to her, and that it might cause his name to be less bright in their minds than it had been before he gave it to her. He further testified that he told Stevens at that time that it was perfectly all right to give the Thousand Dollars if he wanted to and that he didn't have to put it in his Will as to why he gave it to her, and as a result of that the Will was drawn without any reason for his giving her the Thousand Dollars, nor the automobile which he gave her at that time; that he saw Stevens again in September, 1936, when he wanted to change his Will and give her Two Thousand Dollars; that he saw him again in June, 1937, and at that time

Miss Bell would come to see him at the hospital.

"11:- David Morgan, a resident of the hotel and

witness for the defendant, testified that he had known Charles Stevens for twelve or fifteen years; that when his wife was living he saw him in his restaurant every day, and that after her death Stevens was in the restaurant at least once a day, when he was not out of the city. He stated he gave up his job with the railroad and returned to the restaurant quite early, being the president of the union, and most of his time was spent there.

"12:- Ernest A. Morgan, witness for the defendant,

and an attorney, testified that he had known Charles Stevens about May 2, 1936, when he drew a check on Mrs. Bell, he

testified that Charles told him he wanted to give a thousand dollars to James Bell and that he had some doubts in his mind as to how it should be done, and that he called him afterwards drawn without a check or receipt, and that he wanted to have something in his will as to why he should give him this money; that the Bell family in his home town, and other people that he knew, might have some objection to his having given this thousand dollars to him, and that it might cause his name to be less bright in the community than

it had been before he gave it to her. He further testified that he told Stevens at that time that it was perfectly all right to give the thousand dollars if he wanted to and that he didn't have to put it in his will as to why he gave it to her, and as a result of that the will was drawn without any reason for his giving her the thousand dollars, nor the automobile which he gave her at that time; that he saw Stevens again in September, 1936, when he wanted to change his will and give her two thousand dollars; that he saw him again in June, 1937, and at that time

he had raised the amount to Three Thousand Dollars, and still was talking about wanting something in his Will to give his reason for his having given her Three Thousand Dollars. The witness further testified that he suggested that the best idea was to have Stevens write the reason that he thought was the reason for his having given her this money and if he did that every one would understand what it was all about; that Stevens didn't do that but later on in July, 1938, when the next codicil was drawn Stevens brought him a slip of paper on which he had written his reason for giving her the money and that was used in drawing the Will; that the codicil bearing date July 11, 1938, contains the following language:

"I now, therefore, give and bequeath to LAURA DOLL, at present residing at 1062 Thorndale Avenue, Chicago, Illinois, (who by many words and acts of kindness and sympathy encouraged me when I was heavily burdened by sorrow and ill health) any automobile which I may own at the time of my death, and the sum of Four Thousand Dollars (\$4000.00) cash. * * *

"The witness further testified that shortly after this codicil was drawn Stevens came to see him again and asked that a Will be drawn in which he left Laura Doll out completely; that this Will was drawn in July but when Stevens came in to sign it he had changed his mind again and wanted to have Laura Doll in the Will again; that he didn't see Stevens for some time after that and then he asked to have it arranged to have his automobile turned over to Miss Doll, which was done. The witness further testified that the next time he saw Stevens was in September, 1942, when the new Will was drawn in which Stevens left Laura Doll Five Thousand Dollars; that at that time Stevens said he didn't want any mention made as to why he was giving Laura Doll the Five Thousand Dollars; that he said, 'Give her \$5000.00 and then divide up the balance of it between Mrs.

he had raised the amount to Three Thousand Dollars, and still was talking about wanting something in his will to give his reason for his having given her Three Thousand Dollars. The witness further testified that he suggested that the best idea was to have Stevens write the reason that he thought was the reason for his having given her this money and in his will didn't do that but later on in July, 1942, when the next codicil was drawn Stevens brought him a slip of paper on which he had written his reason for giving her the money and that was used in drawing the will; that the codicil bearing date July 11, 1942, contains the following language:

"I now, therefore, give and bequeath to LARA DOLL, at present residing at 1202 North La Salle Avenue, Chicago, Illinois, (who by many words and acts of kindness and sympathy encouraged me when I was heavily burdened by sorrow and ill health) my automobile which I may own at the time of my death, and the sum of Four Thousand Dollars (\$4000.00) cash, & * * *

"The witness further testified that shortly after this codicil was drawn Stevens came to see him again and asked that a will be drawn in which he left Laura Doll out completely; that this will was drawn in July but when Stevens came in to sign it he had changed his mind again and wanted to have Laura Doll in the will again; that he didn't see Stevens for some time after that and then he asked to have it arranged to have his automobile turned over to Miss Doll, which was done. The witness further testified that the next time he saw Stevens was in September, 1942, when the new will was drawn in which Stevens left Laura Doll Five Thousand Dollars; that at that time Stevens said he didn't want any mention made as to why he was giving Laura Doll the Five Thousand Dollars; that he said, 'Give her \$5000.00 and then divide up the balance of it between Mrs.

Longley and Dr. Stevens,' and that was done. He further testified that on March 9, 1943, he was told to draw the Will bearing date March 9, 1943, by one of the officers of the Continental Illinois National Bank and Trust Company of Chicago, who had consulted with Stevens; that he drew the Will and went to see Stevens at the hospital with his stenographer, Miss Johnson; that Stevens was in bed and under the care of a doctor and a nurse; that he consulted with Stevens about the execution of the Will; that he took the Will with him, explained it to Stevens and he signed it.

"13:- Edward Hall, a witness for the defendants, and manager of the Melbourne Hotel where Charles Stevens resided during his lifetime, testified that he had known Stevens since 1929; that in 1937 Stevens, while discussing his financial affairs with him, said that he had his niece to look after and that required money; that Stevens ate most of his meals in Skooglund's restaurant; that he ate there sometimes twice a day and sometimes three times, and always his breakfast; that he left his laundry at the hotel desk every week.

"14:- Ruby Longley, one of the defendants and a niece of Charles Stevens, testified that Stevens would call her up every six weeks or two months following the death of his wife in 1933; that he would call to ask about everybody's health and the family in general; that nearly two years after his wife died he told her that he had a lady friend, described her appearance and said she was quite tall and slender and had reddish hair, that she was young and of the Catholic faith, but said that she needn't fear about his marrying again; that on several occasions he mentioned Laura Doll and said that he had called on her and that he took her out to dinner once a week and to the picture show; that three or four years later he said that he would like

Donley and Dr. Stevens, and that was done, in further testimony that on March 9, 1943, he was told to draw the bill bearing date March 9, 1943, by one of the officers of the Continental Illinois National Bank and Trust Company of Chicago, who had consulted with Stevens; that he drew the bill and went to see Stevens at the hospital with his stenographer, Miss Johnson; that Stevens was in bed and under the care of a doctor and a nurse; that he consulted with Stevens about the execution of the bill; that he took the bill with him, explained it to Stevens and he signed it.

"13:- Edward Bell, a witness for the defendant, and manager of the Elmhurst Hotel, Elmhurst, Illinois, testified during his lifetime, testified that he had known Stevens since 1929; that in 1937 Stevens, while operating his financial affairs with him, said that he had his niece to look after and that required money; that Stevens the head of his home in Chicago's restaurant; that he ate there sometimes twice a day and sometimes three times, and always his breakfast; that he left his laundry at the hotel each every week.

"14:- Ruby Donley, one of the defendants and a niece of Charles Stevens, testified that Stevens would call her up every six weeks or two months following the death of his wife in 1933; that he would call to ask about everybody's health and the family in general; that nearly two years after his wife died he told her that he had a lady friend, described her appearance and said she was quite tall and slender and had reddish hair, that she was young and of the Catholic faith, but said that she needn't fear about his marrying again; that on several occasions he mentioned Laura Bell and said that he had called on her and that he took her out to dinner once a week and to the picture show; that three or four years later he said that he would like

to discontinue his friendship with Laura Doll but that he felt sorry for her. The witness further testified that she went to the hospital the morning he was to be operated on and was in communication with the nurses at all times; that she saw him at the hospital nearly every day; that she visited him at the hotel after he returned from the hospital the first time; that she met Laura Doll there at the hotel one Sunday afternoon; that on that occasion Charles Stevens said that he was expecting Laura Doll and asked her to stay until after she had gone and then said he was trying to break his friendship with her again, that he was being frightened about the expenses at the hospital and he wasn't able to give her the money that he had been giving her. This apparently was the only time that the witness visited Charles Stevens at the hotel although she did testify that he visited her at her home occasionally. The witness further testified that Charles Stevens told her after he went home from the hospital the first time that he wanted to change his Will. The witness further testified that her uncle called a Mr. Cameron at the Continental Bank from the hospital and had him get in touch with Mr. Eklund to go out there and make the Will the day before his death.

"15:- On April 22, 1942, (Defendants' Exhibit No. 3), Charles T. Stevens wrote and signed a statement in which he gave directions with reference to his funeral and the interment of his body in the event of his death. On August 26, 1942, he wrote his niece, Ruby Longley, to the effect that he had been taking medical treatment for about three months, which would indicate that she had not seen or heard from him for at least three months, and in that letter he gave her instructions in detail with reference to his funeral. On September 14, 1942, he made another Will in which he gave Laura Doll \$5000.00 without

to discontinue his friendship with Laura. He said that he felt sorry for her. The witness further testified that she went to the hospital the morning he was to be operated on and was in communication with the nurses at all times; that she saw him at the hospital nearly every day; that she visited him at the hotel after he returned from the hospital the first time; that she met Laura at the hotel one Sunday afternoon; that on that occasion Charles Stevens said that he was expecting Laura to come to the hospital after she had gone and then said he was trying to break his friendship with her again. The witness further testified that the expense at the hospital and he wasn't able to give her the money that he had been giving her. The witness also said that the first time the witness visited Charles Stevens at the hotel although she did testify that he visited her at her home occasionally. The witness further testified that Charles Stevens told her after he went home from the hospital the first time that he wanted to change his will. The witness further testified that her uncle called her to the hospital and told her to go out there and make the will the day before his death. "15:- On April 22, 1942, (Defendant's Exhibit No. 5), Charles E. Stevens wrote and signed a document in which he gave directions with reference to his funeral and the interment of his body in the event of his death. On August 26, 1942, he wrote his niece, Ruby Longley, to the effect that he had been taking medical treatment for about three months, which would indicate that she had not seen or heard from him for at least three months, and in that letter he gave her instructions in detail with reference to his funeral. On September 14, 1942, he made another will in which he gave Laura Doll \$7500.00 without

giving any reasons why he was giving it to her.

"16:- It appears from the inventory filed in the estate of Charles T. Stevens, deceased, in the Probate Court of Cook County, that the value of the personal estate is in excess of \$9000.00.

"FINDINGS

"1. I am convinced from the evidence that Charles Stevens on or about May 2, 1934, entered into an oral agreement with Laura L. Doll, plaintiff, whereby he agreed that if she would give him personal care and attention and act as his companion as long as he should live that he would make his Will and provide therein that she would be paid from his estate the sum of \$1000.00 per year for the rendition of said services, and that after the making of said agreement and in reliance thereon Laura L. Doll, the plaintiff, thereafter continuously until the death of Charles T. Stevens on March 10, 1943, rendered to Charles T. Stevens the services provided for and stipulated in said agreement.

"* * * "

No objection filed by defendants to the master's report challenges the accuracy of the master's statement of the evidence. However, we find, in addition to the evidence stated by the master, certain other evidence that should be mentioned. The witness Martha Mott testified that on numerous occasions Stevens told her that Laura (plaintiff) had done his pressing; that Stevens stated that plaintiff had "washed and ironed and she had gotten meals for him and he said there was nothing like good home cooking at that time. He was always complimenting the cooking." Eleanor Shucker testified that Stevens told her that he met Laura in 1934 and that he had agreed with her then to make out a contract so that Laura would have nothing to worry about; that plaintiff shopped for Stevens and bought his shirts,

giving any reasons why he was giving it to her.

"16:- It appears from the inventory filed in the estate of Charles E. Stevens, deceased, in the Court of Cook County, that the value of the personal estate is in excess of \$9000.00.

WITNESS

"17. I am convinced from the evidence that Charles Stevens

on or about May 2, 1934, entered into an oral agreement with Laura E. Doll, plaintiff, where, he agreed that if she would give him personal care and attention and act as his companion as long as he should live that he would leave her the sum of \$1000.00 per year for the maintenance of said services, and that

after the making of said agreement and in reliance thereon Laura E. Doll, the plaintiff, thereafter continuously until the death of Charles E. Stevens on March 1, 1935, rendered to Charles E. Stevens the services provided for and stipulated in said agreement.

" * * "

No objection filed by defendants to the master's report challenges the accuracy of the master's statement of the evidence. However, we find, in addition to the evidence stated by the master, certain other evidence that should be mentioned. The witness Martha Gott testified that on numerous occasions Stevens told her that Laura (plaintiff) had none of her pressing; that Stevens stated that plaintiff had "washed and ironed and she had gotten meals for him and he said there was nothing like good home cooking at that time. He was always complimenting the cooking." Eleanor Shinker testified that Stevens told her that he met Laura in 1934 and that he had agreed with her then to make out a contract so that Laura would have nothing to worry about; that plaintiff shopped for Stevens and bought his shirts,

socks and ties; that many a time Stevens waited downstairs in plaintiff's hotel for her to bring him his food; that every time the witness visited plaintiff she was washing, sewing or repairing something for Stevens. It appears that when Stevens made a will, or a codicil to one, he would then give plaintiff a copy of the same; that he also gave her a copy of the will of September 14, 1942. She was not present when the will of March 9, 1943, was executed and had no knowledge that it was made until some time after the death of Stevens. Stevens was operated on in January, 1943, and then spent two or three weeks in the hospital, during which time he required the constant attention of nurses. Some days before he died he returned to the hospital, and he died the day after the will of March 9, 1943, was executed. Dr. Cotts saw him "practically every day from January 13th up to March 10th, 1943," the day of his death. Stevens was eighty-three years of age. He left no direct descendants. Ruby Longley testified that between 1934 and the time her uncle died she never saw him at any other place than her home until she visited him at the hospital; that she was in the hospital the day that the operation was to have been performed upon Stevens and that about two weeks thereafter she saw him there nearly every afternoon; that after he returned to the hospital the second time she visited him every day; that Stevens never discussed with her the matter of his wills or the codicils to the same until he returned home after the operation, when he told her that Laura (plaintiff) was remembered in his will but that he wanted to change his will. The following occurred during her examination: "The Master: Q. Were you familiar with the contents of the various wills? A. No, I didn't know a thing about it. The only thing I knew, -- I talked to Mr. Cameron and I said 'I feel badly about that.' He said 'You needn't

...and that; that was a time ... in ...
...in ...
...every time the witness visited ...
...sewing or repairing ...
...when ...
...five ...
...copy of the ...
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...he died he returned to the hospital ...
...the fall of ...
...practically every day from January ...
...1943, the day of his death. Stevens ...
...of age. He felt no direct ...
...line ...
...now had at any other place than ...
...at the hospital; that she was in the hospital ...
...operation was to have been performed ...
...about two weeks thereafter ...
...afternoon; that he returned to the ...
...time she visited him ...
...with her the matter of his ...
...until he returned home after the operation, when he told her ...
...that ...
...wanted to change his will. The following occurred during her ...
...examination: "The Master: ...
...tents of the various wills A. No. I didn't know a thing ...
...about it. The only thing I knew, -- I talked to Mr. Cameron ...
...and I said 'I feel badly about that.' He said 'You needn't

to, Mrs. Longley, because you have always been in your uncle's will, remembered in the will.'" The following also occurred during her examination: "Q. Now, did you call Mr. Eklund to come out to the hospital with the will? A. No, I never called Mr. Eklund. Q. Do you know how Mr. Eklund got out there? A. Well, my uncle called Mr. Cameron at the Continental Bank, and Mr. Cameron took care of it. I don't know. Q. Your uncle called Mr. Cameron at the bank? A. Yes. Q. And had him get in touch with Mr. Eklund to go out there and make his will? A. Yes, as I understand it. Q. Did you have any conversation with Mr. Stevens about the making of this will? A. Not anything in particular. I was there when he called Mr. Cameron, and that was all. Q. You were in the hospital when he called Mr. Cameron? A. Yes. Q. Was that from the hospital or from the — A. From the hospital." While Ernest A. Eklund was being interrogated as to the execution of the will of March 9, 1943, the following occurred: Q. Were you sent for to come there? A. Yes, I was. * * * I was told to draw this will by one of the officers of the Continental Illinois Bank, who had consulted with him. * * * Q. Well, did you take the will with you? A. Yes, I took the will with me." Later in the examination he stated that the will was drawn and executed in the hospital.

Defendants contend: "A contract to be enforceable by specific performance must be express and its terms must be definite and certain as shown by clear and convincing proof.

- a. The burden of proving a contract against the estate of a deceased person is upon the plaintiff and should not be allowed on evidence of doubtful authenticity and genuineness.
- b. Evidence of admissions made by a person since dead should be carefully scrutinized inasmuch as such evidence is liable to abuse." The principles of law stated in the foregoing

contention are well established.

Defendants further contend that alleged declarations and statements of Stevens made outside the presence of plaintiff are insufficient to make out a case for plaintiff. Defendants cite in support of this contention Vail v. Ryneearson, 249 Ill. 501. In that case a decree was entered in the Circuit court in favor of the plaintiff and the Supreme court affirmed the decree. While the opinion states that if the proof of the contract rested upon declarations of Mrs. Harris in the absence of the complainant they would be insufficient, that statement was obiter dictum, for the opinion also states (p. 507) that the contract rested "upon the testimony of the three witnesses who say that they heard it stated between the parties, and if they are to be believed the contract was proved." In Mayo v. Mayo, 302 Ill. 584, the court states (pp. 586, 587): "The rule also is, that while an oral contract to convey land must be established by clear and satisfactory proof, it is not necessary that the contract shall be proved by a third party who heard it made but it may be proved by declarations and conduct of the parties not in the presence of each other. Fletcher v. Osborn, 282 Ill. 143; Kane v. Hudson, 273 id. 350; Lonergan v. Daily, 266 id. 189; Christensen v. Christensen, 265 id. 170; Willis v. Zorger, 258 id. 574; Gladville v. McDole, 247 id. 34; Dalby v. Maxfield, supra [244 Ill. 214]; Daly v. Kohn, 234 Ill. 259; Watson v. Watson, 225 id. 412; Standard v. Standard, 223 id. 255; Geer v. Goudy, 174 id. 514." (See, also, Yager v. Lyon, 337 Ill. 271, 273, 274.) In the instant case most of the statements or admissions of Stevens were made in the presence of plaintiff.

Defendants contend that "the evidence is not sufficient to establish the existence of the contract under the law of

this State." The able and experienced master stated that he was "convinced from the evidence" that the contract was made and that it was performed by plaintiff. After a careful consideration of the evidence we find ourselves in full accord with the conclusion of the master. The fact that the deceased, after each codicil and will was executed, save the will of March 9, 1943, gave a copy of each instrument to plaintiff "for her protection," strongly supports plaintiff's theory of fact. Bearing in mind that the alleged agreement provided that the compensation to be paid plaintiff for services rendered was to be \$1,000 a year and that Stevens was to pay her by executing a will which would provide that she should be paid the said compensation from his estate, we find that about a year after the making of the alleged agreement Stevens executed a codicil to his former will by which he willed to plaintiff \$1,000; that after the agreement had been in force two years he made a new codicil willing her \$2,000; that after the agreement had been in force three years he made a new codicil willing her \$3,000, and after the agreement had been in force four years he executed a new codicil willing her \$4,000. Stevens stated that he gave plaintiff a copy of each codicil when it was executed, "for her protection," and it is reasonably clear that he thereby intended to show her that he was living up to his agreement. Defendants call attention to the fact that Stevens, by the will of September 14, 1942, bequeathed to plaintiff only \$5,000, although eight years had then elapsed since the making of the contract; that he gave her a copy of that will and she therefore knew the contents of it, but that the evidence does not show that she made any objection to the amount. When plaintiff was sworn as a witness in her own behalf, counsel for defendants stated that they would exercise their statutory rights and object to her

"The able and experienced master stated that he was convinced from the evidence that the contract was made and that it was performed by defendant. When a careful consideration of the evidence was made there was in full accord with the contention of the master. The fact that the document, after each receipt and will be executed, gave the bill of lading to plaintiff, gave a copy of each document to plaintiff 'for her protection,' a receipt and a copy of plaintiff's theory of fact. Counting in mind that the alleged agreement provided that the compensation to be paid plaintiff for services rendered was to be \$1,000 a year and that Stevens was to pay her by executing a will which would provide that she should be paid the said compensation from his estate, we find that about a year after the making of the alleged agreement Stevens executed a codicil to his former will by which he willed to plaintiff \$1,000 a year after the agreement had been in force two years he made a new codicil willing her \$2,000; that after the agreement had been in force three years he made a new codicil willing her \$3,000; and after the agreement had been in force four years he executed a new codicil willing her \$4,000. Stevens stated that he gave plaintiff a copy of each codicil when it was executed, 'for her protection,' and it is reasonably clear that he thereby intended to show her that he was living up to his agreement. Defendants call attention to the fact that Stevens, by the will of September 14, 1942, bequeathed to plaintiff only \$5,000, although eight years had then elapsed since the making of the contract; that he gave her a copy of that will and she therefore knew the contents of it, but that the evidence does not show that she made any objection to the amount. When plaintiff was sworn as a witness in her own behalf, counsel for defendants stated that they would exercise their statutory rights and object to her

testifying. The master then asked counsel for defendants to permit him to put one question to plaintiff, but defendants refused to permit the question to be answered. The fact that plaintiff was disqualified as a witness undoubtedly handicapped her in proving her claim. Attorney Eklund, who drew all of the wills and codicils, acted as attorney for Dr. B. L. Stevens and Ruby Longley in the proceedings in the trial court, and represents them in this court. Cameron told Eklund to draw the will. Eklund testified for defendants without withdrawing as their attorney. Defendants argue that ^{this} ~~his~~ testimony is most important as it proves that Stevens never mentioned to Eklund any contract he had with plaintiff; that if Stevens had made the alleged contract with plaintiff he would have told his lawyer about it, and they insist that Eklund's testimony practically destroys plaintiff's claim. The master passed upon the credibility of Eklund and the weight that should be attached to his testimony, and in doing so it was his duty to consider his evidence in the light of certain rules of law. Our Supreme court has repeatedly condemned the practice of attorneys' remaining in law suits and testifying in behalf of their clients. In Crescio v. Crescio, 365 Ill. 393, the court states (p. 400): "We also again remind the bar that the attorney who assumes the burden of witness while representing his client in a lawsuit does so at a very great detriment to the credibility of his testimony. Wiederhold v. Wiederhold, 305 Ill. 429; Wetzel v. Firebaugh, 251 id. 190." As to the testimony of Ruby Longley that Stevens told her upon a number of occasions that he was trying to break his friendship with plaintiff, it is evident that the master attached little, if any, weight to that testimony. In addition to the fact that the witness was interested in the result of this suit, the said testimony was not supported by any other evidence in

defendants at which time he gave the evidence as reported which
defendants' testimony is strongly relied upon.

The master then asked counsel for defendants
to point him to put one question to plaintiff, but defend-
ants refused to permit the question to be answered. The
fact that plaintiff was designated as a witness undoubtedly
indicated her in proving her claim. Attorney Brown, who
know all of the facts and details, acted as attorney for
Mr. J. H. Stevens and wife during the proceedings in this
trial court, and represented them in both state and federal
courts to win the case. During testimony for defendant
without objection as their attorney, defendant's lawyer
first testified, it was stated in evidence that Stevens
never mentioned to Brown any matter which indicated
that he knew anything about the contents of the plaintiff's
will or that he had ever seen it, and they insist that
Brown's testimony regarding defendant's will is false.
The master passed upon the credibility of Brown and the
weight that should be put upon his testimony, and in doing
so it was his duty to consider his evidence in the light of
certain rules of law. One source of law has repeatedly con-
demned the practice of attorneys remaining in law suits and
testifying in behalf of their clients. In Griggs v. Griggs,
307 Ill. 393, the court stated: "It is also again wrong
the fact that the attorney who assumes the burden of witness-
ship while representing his client in a lawsuit does so at a very
great detriment to the credibility of his testimony." Hedberg v. Hedberg,
307 Ill. 393; Wetzel v. Wetzel, 307 Ill. 393.
As to the testimony of Ruby Longley that Stevens told her upon
a number of occasions that he was trying to break his friendship
with plaintiff, it is evident that the master attached little,
if any, weight to that testimony. In addition to the fact
that the witness was interested in the result of this suit,
the said testimony was not supported by any other evidence in

the case. Even the testimony of Eklund strongly tends to discredit her testimony. We are aware that this is not a proceeding to set aside a will, but the point is made that the will of March 9, 1943, tends to disprove the alleged agreement, and therefore we deem it pertinent to state that it is difficult to believe, in the light of all the facts and circumstances in evidence, that Stevens, who had been ill for several years, who feared death as far back as August, 1942, who underwent an operation in January, 1943, and had been attended daily by a doctor for two months before his death, knowingly and of his own free will executed a will a few hours before his death that omits to mention the woman who, according to his own statements, had been so helpful and kind to him that he did not know how he would have gone on living without her, and in the said will gave practically all of his estate to his nephew and niece, although he had stated to witnesses that his relatives had deserted him and had no interest in him. That Ruby Longley played some part in having the dying man make a new will appears from the evidence. Stevens told Mrs. Longley that he had remembered plaintiff in his will, and Mrs. Longley testified that she said to Cameron, "I feel badly about it." Her answer to the question, whether she had any conversation with Stevens about the making of the will, "Not anything in particular," shows that she did have some talk with him upon the subject. The attorney who drew the last will later appears as the attorney for Mrs. Longley and Dr. Stevens. It may well be that Stevens, who had acknowledged for nine years his indebtedness to plaintiff and had will^{ed} her moneys in a number of codicils and a will, did not knowingly and of his own free will repudiate his contract with plaintiff. The evidence does

not show his mental and physical condition at the time he signed the will, although defendants called Dr. Cotts as a witness.

We find no merit in defendants' contention that the evidence does not prove plaintiff's claim that she fully performed the service that she agreed to perform. In addition to the evidence given by witnesses as to the services she rendered to Stevens, the codicils executed by Stevens from year to year tend to prove that he considered that she was performing her part of the contract.

Defendants contend that a "contract for personal care and attention cannot be specifically enforced unless such services have been fully performed and the circumstances are such that to deny specific performance would leave the party with an injury that could not be adequately compensated in damages." In support of this contention they cite Wagner v. Maxey, 206 Ill. App. 452, and Anderson v. Olsen, 188 Ill. 502, which follow the established rule that courts of equity do not sit for the purpose of entertaining bills the only object of which is to secure damages, and that equity will not decree specific performance of a contract which relates to personalty when compensation in damages furnishes a complete and satisfactory remedy. In the instant case the alleged agreement provided that if plaintiff rendered the services deceased would by his will provide for the payment therefor at the rate of \$1,000 per year. The master stated that he was convinced from the evidence that plaintiff performed the services to the day of the death of Stevens, March 10, 1943, or almost nine years. Defendants pleaded, among other defenses, the five year Statute of Limitations. In an action at law, that statute would bar all compensation for services rendered prior to March 11, 1938, or about four years. In Holsz v. Stephen, 362 Ill. 527, the

court states (pp. 532, 533): "The remedy [specific performance] is afforded where the contract has been performed by one party in such a way that the parties cannot be placed in statu quo or damages awarded which would be full compensation. (Weir v. Weir, 287 Ill. 495; Koenig v. Dohm, 209 id. 468.) The performance relied upon must place the party who has performed in such a situation that it would be a fraud upon him if the agreement were not carried out.

(Nelson v. Nelson, 334 Ill. 43.) To take an oral promise which has been partly performed out of the statute, part performance must be such that a restoration of their previous condition is impracticable and a refusal to go on and complete the engagement would be a virtual fraud upon the parties.

(Shaver v. Wickwire, 335 Ill. 46; Stephens v. Collison, 313 id. 365.) The performance of personal services, the value of which may be estimated in money, or for which a recovery may be had at law, will not take the contract out of the statute, because the law affords an adequate remedy. It is only where the Statute of Limitations bars a recovery at law,

or where the improvements made or services performed cannot be adequately compensated at law, or where failure to carry out the agreement will amount to a fraud on the promisee, that specific performance will be decreed." (Italics ours.) In Oswald v. Nehls, 233 Ill. 438 (cited by defendants), the court states (p. 446): "Contracts for personal care and attention or personal services cannot usually be enforced specifically. However, when personal care and attention or personal services have been fully performed, and the circumstances are such that to deny specific performance would leave the party with an injury that could not be adequately compensated in damages, equity will grant a specific performance

of the remaining provisions of the contract. Page on Contracts, sec. 1623, and cases therein cited." Other cases might be cited which hold that a contract such as the one at bar can be enforced in equity where the Statute of Limitations bars recovery at law or where failure to carry it out would be a fraud on the promisee.

Defendants contend that the decree ordered the payment of money and that this order was improper because a court of equity ~~cannot~~ has no jurisdiction to decree specific performance of the payment of money. As defendants failed to argue this contention we find it difficult to understand their position. The decree fixes plaintiff's compensation at \$8,853.72, which amount is compensation for plaintiff from the date of the agreement to the date of the death of Stevens at the rate provided for in the agreement, and it impresses a trust on all of the assets of the estate of Stevens, subject to the rights of creditors and the costs and expenses of administration, and the decree ordered the amount fixed to be paid in due course of administration. This was proper procedure. (See Ohlendiek v. Schuler, 299 Fed. 162.) Such a trust will be enforced against the heirs and personal representatives of the deceased. (Klussman v. Wessling, 238 Ill. 568; Whiton v. Whiton, 179 Ill. 32; Smith v. Smith, 340 Ill. 34, 38, 39.)

An able and experienced chancellor sustained the findings and conclusions of the master. We find ourselves in full accord with the actions of both.

The decree of the Circuit court of Cook county is a just one and it is affirmed.

DECREE AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

Abstract

325 I.A. 449

GEN. NO. 10004

AGENDA NO. 3

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1945

ETHEL G. FIDLER,

APPELLEE,

vs.

JOHN KENNEDY, ESTELLE

KENNEDY, and EDITH P.

KENNEDY,

APPELLANTS.

APPEAL FROM THE CIRCUIT

COURT OF DUPAGE COUNTY.

HUFFMAN, J.

Appellants bring this appeal from order denying their motion to open up a judgment by confession and for a hearing on the merits. They purchased from appellee, twenty-two heifers at the price of \$3300; they gave their judgment note in said amount together with chattel mortgage on the cattle as security for the purchase price. The note was dated November 15, 1943; it provided for payment in monthly installments of \$125, per month, the first of such installments to become payable on January 10, 1944. On February 21,

10-11-57

THE UNITED STATES OF AMERICA

IN SENATE

COMMITTEE ON LABOR AND HUMAN RESOURCES

HEARINGS

ON

THE PROPOSED

AMENDMENTS TO THE

LABOR-MANAGEMENT DISPUTE ACT OF 1947

AND

THE NATIONAL LABOR RELATIONS BOARD ACT OF 1935

AND

THE NATIONAL LABOR RELATIONS BOARD ACT OF 1935

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THE NATIONAL LABOR RELATIONS BOARD ACT OF 1935

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THE NATIONAL LABOR RELATIONS BOARD ACT OF 1935

1944, appellee placed the note in judgment in the full amount against appellants.

Following entry of the judgment herein, appellants filed their motion, supported by affidavit, to open up said judgment and for leave to make defense on the merits. Appellee filed counter-affidavit thereto. It is the subject matter of appellants' affidavit filed in support of their motion which is the substance of this suit. If the same shall be considered sufficient as to the whole or a part of appellee's demand, then appellants should have the right to present their defense on the merits.

It is alleged in appellants' affidavit that the heifers were purchased as dairy cattle; that all parties so understood; that it was agreed they would shortly freshen; that they were in perfect health and sound physical condition; that they had been subjected to and passed all tests required to be made of cattle for dairy purposes; that appellants would be furnished official certificates as to each of said heifers with respect to the above tests; that a bill of sale would be delivered to appellants for said cattle; that the cattle were to be what is commonly termed, first calf dairy heifers; and that relying upon such guaranties and warranty, appellants so purchased said heifers.

The affidavit further states that when the heifers calved, it was discovered that they were afflicted with

disease incident to cattle; that they had hard quarters; that they had hard or blind quarters; that twelve of said heifers came in with blind quarters, mastitis or aborted; that appellants made effort to obtain compliance from appellee with the terms of their transaction and an amicable settlement and adjustment with respect to the diseased cattle; that at the time the judgment was entered, \$250, was then due on the note; that during this time appellants had been attempting to negotiate with appellee with respect to securing some adjustment or settlement between them with respect to the matter; that no steps were taken by appellee to foreclose on the mortgage. It is alleged that no bill of sale was ever delivered. It is further alleged that no provision was incorporated in the note which provided for the acceleration of the payments of installments, but that the only authorization for the taking of judgment by confession was for such amount as was unpaid at the time of entry of any such judgment; and that the only provision with respect to the right of appellee upon default in payment of any installment, was to take judgment for the amount then due, and the further right to foreclose the chattel mortgage securing payment of the note.

While the above expressions do not appear in the affidavit in identical language, yet we cannot undertake to incorporate the entire affidavit herein. Such defenses are set forth. We find no express provision in the note

accelerating the unpaid balance at the time of any default in installment. However, the note incorporates a warrant of attorney to confess judgment for such amount as may appear to be unpaid.

Appellee by counter-affidavit, denied allegations of appellants' affidavit which were directed toward issues of fact, going to the merits of the matter. Counter-affidavits which go to questions of fact raised on the merits should not be considered as controlling on motion to open a judgment by confession and for leave to defend. *Stranak v. Tomasovic*, 309 Ill. App. 177, 181. Rule 26 of the Supreme Court, relative to this situation, provides that the complaint, motion and affidavit, and counter-affidavits, shall constitute the pleadings, unless the parties secure leave to file further pleadings. This rule recognizes that issues of fact raised by the affidavit and counter-affidavit, going to the merits of the controversy, are to be thus formed and trial had thereon.

We are of the opinion the affidavit of appellants was sufficient. The order of the trial court denying the motion is reversed, and the cause remanded with directions to open up the judgment to permit appellants to present their defense on the merits.

Reversed and remanded with directions.

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Gen. No. 10005.

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Agenda No. 4.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1945.

3261A.450'

| | | |
|----------------------|---|------------------|
| C. H. RAMSEY, |) | |
| Plaintiff-Appellant, |) | |
| |) | Appeal from |
| vs. |) | County Court |
| |) | Kankakee County. |
| STANLEY A. BOWLBY, |) | |
| Defendant-Appellee. |) | |

WOLFE,-- J.

The plaintiff, C. H. Ramsey, started a suit in attachment against the defendant, Stanley A. Bowlby, in the Circuit Court in Kankakee County, Illinois. The writ was duly served by attaching certain interests in the real estate in said county owned by the defendant. There is no question raised as to the legality of the attachment proceedings. The only defense made is one of liability upon the note involved in this suit.

The plaintiff filed his complaint declaring upon a certain non-negotiable note in the principal sum of \$1,500.00, and interest thereon, at the rate of 6% per annum from April 29, 1940. He alleged that no part of the note was paid, and claimed damages against the defendant in the sum of \$1,755.50. A copy of the note was attached to the complaint.

12/2/50

TO THE DIRECTOR, BUREAU OF PRISONS, ALBANY, NEW YORK

FROM: [illegible]
SUBJECT: [illegible]
RE: [illegible]

[illegible text]

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[illegible text]

[illegible text]

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The defendant filed his answer in which he admitted the execution of the note, but denied that it bore any interest. He admitted that the plaintiff was the holder and owner of the note. He denied that he was indebted to the plaintiff in any sum whatsoever; and for a further defense, he alleges that there was no consideration of any kind whatsoever for the execution and delivery of the instrument set forth in the complaint, because, that, on or about the 10th day of December, 1939, he,-- then the sole proprietor of a store known as "Bowlby's Market", located at 3801 Wyoming Street in St. Louis, Missouri,-- entered into an oral agreement with the plaintiff, C. H. Ramsey, whereby said plaintiff agreed to pay \$1,500.00 for a half interest in said business, which business was to be an equal partnership consisting of the plaintiff and the defendant. The money furnished by the plaintiff was to be used by the defendant in increasing the stock and fixtures of the store and said sum of \$1,500.00 was sent to the defendant by the plaintiff on or about the 13th day of December, 1939 and was received by the defendant and used by him for the purpose theretofore agreed upon. He alleges that it had been agreed by and between the plaintiff and the defendant that the proceeds of the business were to be divided equally and that the partners were equally liable for the debts incurred during the operation of the business; that in the spring of 1940 the business ceased to prosper and it became necessary to liquidate the same; that

3.

pending liquidation the plaintiff gave to the defendant a non-negotiable note in form substantially the same as "Exhibit A" attached to the complaint to serve as a memoranda of the interest in the business owned by the plaintiff; that at the time the note was executed it was anticipated that the stock and fixtures would sell for sufficient amount to pay all debts and to leave a surplus to be divided between the plaintiff and defendant as partners.

The case was tried before the Court without a jury. He found the issues in favor of the defendant, and dissolved the attachment proceeding, and assessed the costs against the plaintiff. It is from this judgment that the plaintiff has perfected an appeal to this Court.

There is very little dispute as to the facts. It is agreed that the plaintiff paid to the defendant \$1,500.00 cash for one-half interest in his business in St. Louis, Missouri; that this money was to be used for improvements and stock in the store; that the plaintiff's son was to be hired as a clerk in the store; that he was so hired for a short time. The business was unprofitable and within a few months it was discontinued.

There has never been a settlement between the plaintiff and the defendant of the assets of this venture. The abstract contains the opinion of the trial court in which he found that there was a partnership formed between the plaintiff and the defendant, and that there was no consideration given for the note in question. Appellee seriously contends that the agreement

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should not be construed, as being a completed partnership, but at the most it was only an agreement to form a partnership on certain conditions. We cannot agree with this contention, as we think the evidence clearly shows that there was a completed partnership between the parties. There has never been a settlement of the partnership assets. We think that the trial court properly held that there was no consideration for this note, and the judgment should be affirmed.

Judgment affirmed.

42934

EDWARD J. DREGOI,
Appellant,

v.

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

326 1/2 450²

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Edward J. Dregoi, as a former policyholder and member of the John Hancock Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the John Hancock Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

EDWARD J. BINGO
Appellant

APPEAL FROM CIRCUIT COURT

IN AND FOR THE COUNTY OF

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY
Defendant

388 104 150

THE FOLLOWING VERIFICATION WAS FILED WITH THE CLERK OF THE COURT

I, Plaintiff, Edward J. Bingol, as a former policyholder

and member of the John Hancock Mutual Life Insurance Company,

brought this suit in equity against said insurance company on

his own behalf and on behalf of all other former policyholders

in the defendant company who were similarly situated and whom

he claimed to represent. The complaint alleged Plaintiff's

right and the right of the other former policyholders to share

in the "contingency reserve" fund of the defendant company

which had accrued during the time their policies were in force

and prayed for an accounting and an order of distribution to

the end that all former policyholders of the John Hancock

Mutual Life Insurance Company might be paid from its "contingency

reserve" fund the amounts they respectively contributed thereto

through their payment of premiums before they voluntarily allowed

their policies to lapse for nonpayment of premiums or had surren-

dered them for their cash value or the equivalent thereof in

the form of term, extended or paid-up insurance. Defendant

filed a motion to dismiss Plaintiff's complaint on several

grounds pursuant to Sections 45 and 46 of the Civil Practice

Act (Pars. 109 and 112, Chap. 110, Ill. Rev. Stat. 1943) and

the chancellor sustained the motion. Plaintiff electing to

stand on his complaint, a final order was entered dismissing

this case for want of equity. Plaintiff appeals from this

order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 48913. The opinion in case No. 48913 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 48913. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Smith v. The Pacific Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

WITNESSES,

Friend and Counsel, J. J. Conner.

42935

MORRIS SINGER,

Appellant,

v.

MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a corporation,
Appellee.

3261A. 451

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Morris Singer, as a former policyholder and member of the Mutual Life Insurance Company of New York, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Mutual Life Insurance Company of New York might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

3201A.431

42935

MORRIS SINGER,

Appellant,

v.

MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, a corporation,
Appellee.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Morris Singer, as a former policyholder and

member of the Mutual Life Insurance Company of New York,

brought this suit in equity against said insurance company on

his own behalf and on behalf of all other former policyholders

in the defendant company who were similarly situated and whom

he claimed to represent. The complaint alleged plaintiff's

right and the right of the other former policyholders to

share in the "contingency reserve" fund of the defendant

company which had accrued during the time their policies were

in force and prayed for an accounting and an order of distri-

bution to the end that all former policyholders of the Mutual Life

Insurance Company of New York might be paid from its "contingency

reserve" fund the amounts they respectively contributed

thereto through their payment of premiums before they volun-

tarily allowed their policies to lapse for nonpayment of

premiums or had surrendered them for their cash value or the

equivalent thereof in the form of term, extended or paid-up

insurance. Defendant filed a motion to dismiss plaintiff's

complaint on several grounds pursuant to sections 45 and 48

of the Civil Practice Act (Para. 169 and 172, Chap. 110,

Ill. Rev. Stat. 1943) and the chancellor sustained the

motion. Plaintiff electing to stand on his complaint, a

final order was entered dismissing this case for want of

equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

The appeal in this case was consolidated for hearing

in this court with appeals heard in certain other

cases, including case No. 42933. The opinion in case

No. 42933 is filed concurrently with this opinion. The

allegations of Plaintiff's complaint and the grounds asserted

in defendant's motion for dismissal in this case are practically

identical with the allegations of the complaint and the grounds

asserted in the defendant's motion to dismiss in case No. 42933.

The final order of the court entered in that case was the same

as in this case and the same questions were presented for review.

Our decision in that case (*Smith v. The City of Los Angeles*)

booster of the City of Los Angeles is controlling as to the questions

presented here and for the reasons stated therein the final

order of the circuit court sustaining this appeal for want of

opportunity is affirmed.

ATTEST.

Friend and Beaman, JJ., concur.

42936

JOHN CAMINKER,
Appellant,

v.

NEW YORK LIFE INSURANCE
COMPANY, a corporation,
Appellee.

3204A. 451²

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) APPEAL FROM CIRCUIT
)
) COURT, COOK COUNTY.
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MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT

Plaintiff, John Caminker, as a former policyholder and member of the New York Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the New York Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

JOHN CANNIKER, Plaintiff,
 v.
 NEW YORK LIFE INSURANCE COMPANY, a corporation, Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUDGE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, John Canniker, as a former policyholder and member of the New York Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the New York Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pers. 189 and 192, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

The appeal in this case was consolidated for hearing in this court with appeals perfected in thirteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case, The Trustees Life Insurance Society of the United States, is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit Court dismissing this case for want of equity is affirmed.

W. H. HARRIS,

Friend and Son, Inc., 11, corner,

42937

326 L.A. 452

LOUIS A. FOSSE,
Appellant,

v.

NATIONAL LIFE INSURANCE
COMPANY, a corporation,
Appellee.

)
)
) APPEAL FROM CIRCUIT COURT,
)
) COOK COUNTY.
)

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Louis A. Fosse, as a former policyholder and member of the National Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the National Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustain the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing

33-11138

4-23-37

LOUIS A. ROSS,
Appellant,

vs.

THE NATIONAL LIFE INSURANCE COMPANY, a corporation,
Appellee.

MR. PRISING JUSTICE BULLIVANT DELIVERED THE OPINION OF THE COURT.

Plaintiff, Louis A. Ross, as a former policyholder and member of the National Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged that the defendant company was entitled to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and payable for an accounting and an order of distribution to the said that all former policyholders of the National Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto toward their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Laws, 1907 and 1912, Chap. 110, III. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing

-2-

in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

in this court with special reference to different other cases, including case No. 4293. The court in case No. 4293 is called consequently with this question. The disposition of plaintiff's complaint was the same. The court in defendant's motion for dismissal in this case was substantially identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 4293. The final order of dismissal entered in this case was the same as in this case and the same reasons were presented for review. The decision in that case, Wright v. The Life Assurance Society of the United States, is controlling as to the questions presented here and for the reasons stated therein the final order of the circuit court is affirmed. This case for want of equity is affirmed.

Wright.

Trinity and Southern, L. C. Court.

42938

328 I.A. 4527

SIMON L. BERNSTEIN,
Appellant,

v.

SECURITY MUTUAL LIFE INSURANCE
COMPANY, a corporation,
Appellee.

)
) APPEAL FROM CIRCUIT
) COURT, COOK COUNTY.
)
)

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Simon L. Bernstein, as a former policyholder and member of the Security Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Security Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

SIMON L. BERENSON, Plaintiff,
v.
SHOOTING METHOD THEATRE COMPANY, a corporation, Defendant.

FILED FROM CIRCUIT COURT, 6th DISTRICT.

MR. PRESIDING JUDGE OF THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

Plaintiff, Simon L. Berenson, as a former policyholder and member of the Shooting Method Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who are similarly situated and whom he claims to represent. The complaint alleged Plaintiff's right and the right of the other former policyholders to share in the "contingent reserve fund" of the defendant company which had accrued during the time their policies were in force and proved for in accounting and in order of distribution to the said and the said former policyholders of the equity fund of the insurance company might be paid from the "contingency reserve" and the amounts they respectively contributed thereto should their payment of premiums before they voluntarily altered their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Plaintiff filed a motion to dismiss Plaintiff's complaint on several grounds pursuant to Sections 49 and 50 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the Chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Dubin v. The Equitable Life Insurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

FINED.

Friend and Scanlan, JJ., concur.

the appeal in this case was consolidated for hearing

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42939

DAVID H. CAPLOW,
Appellant,

v.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a
corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, David H. Caplow, as a former policyholder and member of the Prudential Insurance Company of America, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Prudential Insurance Company of America might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

DAVID H. CARP
Appellant

U.S. COURT OF APPEALS

v.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA
Corporation
Respondent

U.S. DISTRICT COURT

1943-1944

1. Plaintiff, David H. Carp, a former policyholder and member of the Prudential Insurance Company of America, brought this suit in equity against said company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and who are claimed to represent the same class. Plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had a normal funding of their policies were in issue and argued for an accounting and an order of distribution to the said all former policyholders of the Prudential Insurance Company of America might be paid from its "contingency reserve" fund the amount they respectively contributed thereto through their payment of premiums as one they voluntarily allowed their policy to lapse for nonpayment of premiums or had surrendered same for a cash value or the equivalent thereof in the form of loan, extension or paid-up insurance. Defendant filed a motion to dismiss Plaintiff's complaint on several grounds pursuant to Sections 42 and 48 of the Civil Practice Act (Para. 159 and 175, Chap. 110, N.Y. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

42940

IRWIN JACK HOLDEN,

Appellant,

v.

HOME LIFE INSURANCE COMPANY,

Appellee.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

3261.A. 453²

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Irwin Jack Holden, as a former policyholder and member of the Home Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Home Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed there- to through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

IRWIN JACK HENDER, Plaintiff,

v.

HOME LIFE INSURANCE CO., Defendant.

Appealed.

MR. JUSTICE THOMAS, Circuit Court of the United States for the District of Columbia.

Plaintiff, Irwin Jack Hender, vs. Defendant, Home Life Insurance Company.

Hender was a member of the Home Life Insurance Company, and

that fact in equity against said insurance company on his own

behalf and on behalf of all other former policyholders in the

defendant company who were similarly situated and who are entitled

to repayment. The complaint alleged that the right to the

right of the other former policyholders to share in the "reserve"

"reserve" fund of the defendant company was denied them.

The time their policies were in force was denied them and no accounting

and an order of distribution to the said fund was denied them.

of the Home Life Insurance Company, and that the "reserve"

company reserve" fund was unlawfully and wrongfully withheld there-

to through their payment of premiums before they voluntarily allowed

their policies to lapse for non-payment of premiums on said withheld

them for their cash value or the of interest thereof in the form of

terms, extended or paid-up insurance. Plaintiff filed a motion to

dismiss plaintiff's complaint on several grounds pursuant to sections

45 and 48 of the Civil Practice Act (D.C. 1942, Chap. 110,

Ill. Rev. Stat. 1943) and the on motion sustained the motion.

Plaintiff electing to stand on his complaint, a final order was

entered dismissing this case for want of equity. Plaintiff appeals

from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

42941

326 T.A. 454

EDWARD K. STACKLER,
Appellant,

v.

NEW ENGLAND MUTUAL LIFE
INSURANCE COMPANY, a corporation,
Appellee.

)
)
) APPEAL FROM CIRCUIT
)
) COURT OF COOK COUNTY.
)

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Edward K. Stackler, as a former policyholder and member of the New England Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the New England Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

JEL 549 - 07/19/14
 JEL 549 - 07/19/14

STUDY LIMITATIONS

THE JOURNAL OF THE

1991-1992

cc: [redacted] and [redacted], [redacted], [redacted]

No attempt to represent

100-443887-100

their policies to include the non-legal aspects of justice.

Reported on 12/11/1961. No other data. The 1st and 2nd homologs were

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October 11, 1901. Mr. J. H. ... of ...

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the Chancellor stated the location of the "Black" school to be

Экспертное заключение по делу № 12/2019 от 12.05.2019 г.

THIS CASE FOR WANT OF EVIDENCE, REVERTS TO JURY.

• Tebzo

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 4293. The opinion in case No. 4293 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 4293. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (High v. The United Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the circuit court dismissing this cause for want of equity is affirmed.

Friend and Norman, Jr., counsel.

42942

WILLIAM H. KRUSPE,

Appellant,

v.

BANKERS LIFE COMPANY,

Appellee.

APPEAL FROM THE CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, William H. Kruspe, as a former policyholder and member of the Bankers Life Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Bankers Life Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed

WILLIAM H. KNUDSEN,

Appellant,

v.

BANKERS LIFE COMPANY,

Appellee.

MR. PRESIDENT JUSTICE WILLIAM H. KNUDSEN vs. THE BANKERS LIFE COMPANY.

Plaintiff, William H. Knudsen, as a former policy-

holder and member of the Bankers Life Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The

complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and payable for an accounting and an order of distribution to the said all former policyholders of the Bankers Life Company which he said from the "contingency reserve" fund the amounts they respectively contributed thereto through

their payment of premiums before they voluntarily allowed their policies to lapse for non-payment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion

to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Ives, 183 and 184, Chap. 110, Ill. Rev. Stat. 1943) and the association asserted the

motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42335. The opinion in case No. 42335 is filed

-2-

concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

concurrently with this motion. The allegations of Plaintiff's complaint and the grounds asserted in Defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in Defendant's motion to dismiss in case No. 4153. The final order of Plaintiff entered in that case was the same as in this case and the same questions were presented for trial. Our decision in that case (Smith v. The Republic Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the circuit court, dismissing this cause for want of equity is affirmed.

-11-

Friend and Counsel, C. J. Brown.

42943

JOHN H. ERBY,
Appellant,

v.

PENN MUTUAL LIFE INSURANCE
COMPANY, a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

323 I.A. 455

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, John H. Erby, as a former policyholder and member of the Penn Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Penn Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

JOHN H. HARRIS, Appellant,

v.

THE HARRIS LIFE INSURANCE COMPANY, a corporation of Illinois.

CHANCERY COURT.

FILED FOR RECORD

FILED FOR RECORD

Plaintiff, John H. Harris, as a former policyholder and member of the Harris Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and who he claimed to represent. The complaint alleged that the plaintiff and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the company share equally in the contingency reserve fund of the company. The complaint further alleged that the amount of the contingency reserve fund was \$100,000.00 and that the plaintiff and the other former policyholders were entitled to their proportionate share thereof through their payment of premiums. They voluntarily allowed their policies to lapse for non-payment of premium or had surrendered them for their cash value or the equivalent thereof in the form of a loan, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to sections 45 and 46 of the CIVIL PRACTICE ACT (Harris, 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 75th, 76th, 77th, 78th, 79th, 80th, 81st, 82nd, 83rd, 84th, 85th, 86th, 87th, 88th, 89th, 90th, 91st, 92nd, 93rd, 94th, 95th, 96th, 97th, 98th, 99th, 100th, 101st, 102nd, 103rd, 104th, 105th, 106th, 107th, 108th, 109th, 110th, 111th, 112th, 113th, 114th, 115th, 116th, 117th, 118th, 119th, 120th, 121st, 122nd, 123rd, 124th, 125th, 126th, 127th, 128th, 129th, 130th, 131st, 132nd, 133rd, 134th, 135th, 136th, 137th, 138th, 139th, 140th, 141st, 142nd, 143rd, 144th, 145th, 146th, 147th, 148th, 149th, 150th, 151st, 152nd, 153rd, 154th, 155th, 156th, 157th, 158th, 159th, 160th, 161st, 162nd, 163rd, 164th, 165th, 166th, 167th, 168th, 169th, 170th, 171st, 172nd, 173rd, 174th, 175th, 176th, 177th, 178th, 179th, 180th, 181st, 182nd, 183rd, 184th, 185th, 186th, 187th, 188th, 189th, 190th, 191st, 192nd, 193rd, 194th, 195th, 196th, 197th, 198th, 199th, 200th, 201st, 202nd, 203rd, 204th, 205th, 206th, 207th, 208th, 209th, 210th, 211th, 212th, 213th, 214th, 215th, 216th, 217th, 218th, 219th, 220th, 221st, 222nd, 223rd, 224th, 225th, 226th, 227th, 228th, 229th, 230th, 231st, 232nd, 233rd, 234th, 235th, 236th, 237th, 238th, 239th, 240th, 241st, 242nd, 243rd, 244th, 245th, 246th, 247th, 248th, 249th, 250th, 251st, 252nd, 253rd, 254th, 255th, 256th, 257th, 258th, 259th, 260th, 261st, 262nd, 263rd, 264th, 265th, 266th, 267th, 268th, 269th, 270th, 271st, 272nd, 273rd, 274th, 275th, 276th, 277th, 278th, 279th, 280th, 281st, 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The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

42944

WATSON A. SIMMONDS,
Appellant,

v.

STATE MUTUAL LIFE INSURANCE
COMPANY, a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Watson A. Simmonds, as a former policyholder and member of the State Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the ^{defendant} company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the State Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

STATE OF NEW YORK
County of ...

IN SENATE

JANUARY 1904

STATE OF NEW YORK
County of ...

IN SENATE

... as a ...
... and member of the ...
... this suit in equity ...
... behind and on behalf of ...
... defendant company ...
... claimed to represent ...
... right and the right of the ...
... share in the ...
... had accrued during the ...
... prayed for an accounting and an order of distribution to the ...
... and that all ...
... Insurance company ...
... found the amounts they ...
... their payment of ...
... policies to lapse for nonpayment of ...
... them for their cash value ...
... term of term, extended on ...
... a motion to dismiss ...
... pursuant to sections 47 and 48 of the ...
... (Part. 169 and 170, Chap. 112, Sec. 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

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AFFIRMED.

Friend and Scanlan, JJ., concur.

The appeal in this case is consolidated for hearing in this court with appeal No. 45,333. The appeal in case No. 45,333 is filed concurrently with this appeal. The allegations of appellant's complaint and the grounds asserted in appellant's motion for dismissal in this case are substantially identical with the allegations of the complaint and the grounds asserted in the appellant's motion to dismiss in case No. 45,333. The final order of dismissal entered in this case was the same as in this case and the same grounds were presented for review. Our opinion in this case is included in the consolidated opinion of the court in case No. 45,333. As our opinion in this case is included in the consolidated opinion of the court in case No. 45,333, the reasons stated therein for the final order of the court in case No. 45,333 are the reasons for the final order of the court in this case. This case is for want of equity is dismissed.

THE COURT.

Trinity and Southern, Inc., counsel.

42945

WALTER F. JONES,

Appellant,

v.

ACACIA MUTUAL LIFE INSURANCE COMPANY,
a corporation,

Appellee.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Walter F. Jones, as a former policyholder and member of the Acacia Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Acacia Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

The appeal in this case was concentrated on leaving
in this court with the sole purpose of obtaining other cases,
including case No. 19750. The motion in case No. 4285 is
filed concurrently with this appeal. The allegations of
plaintiff's complaint and the grounds asserted in defendant's
motion for dismissal in this case are identical to those
with the allegations of the complaint in the motion asserted
in the defendant's motion to dismiss in case No. 4285. The
final order of dismissal entered in that case was the same as
in this case and the same grounds were asserted for review.
Our decision in that case (United v. The American Life Insurance
Society of the United States) is controlling as to the questions
presented here and for the reasons stated therein the final
order of the Circuit Court should be affirmed and this case should be
certified as affirmed.

W. H. HALL.

Friend and Counsel, U.S. Circuit.

42946

326-11-456

ARTHUR J. SCHNASE,

Appellant,

v.

PHOENIX MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellee.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Arthur J. Schnase, as a former policyholder and member of the Phoenix Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Phoenix Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

ARTHUR J. SCHWARTZ,

Plaintiff,

v.

PHOENIX MUTUAL LIFE INSURANCE COMPANY, a corporation,

Defendant.

IN SENATE, JANUARY 1, 1914.

Plaintiff, Arthur J. Schwartz, as a former policyholder and member of the Phoenix Mutual Life Insurance Company,

brought this suit in equity against said insurance company on

his own behalf and on behalf of all other former policyholders

in the defendant company who were similarly situated and whom

he claimed to represent. The complaint alleged plaintiff's

right and the right of the other former policyholders to share

in the "contingency reserve" fund of the defendant company which

had accrued during the time their policies were in force and

prayed for an accounting and an order of distribution to this end

that all former policyholders of the Phoenix Mutual Life Insurance

Company might be paid from the "contingency reserve" fund the

amounts they respectively contributed thereto in their

payment of premiums before they voluntarily allowed their

policies to lapse for nonpayment of premiums or had surrendered

them for their cash value or the surrender amount in the form

of term, extended or paid-up insurance. Defendant filed a motion

to dismiss plaintiff's complaint on several grounds pursuant to

Sections 45 and 48 of the Civil Practice Act (Stats. 1909 and 1912,

Chap. 110, Ill. Rev. Stat. 1903) and the chancellor sustained

the motion. Plaintiff electing to stand on his complaint, a

final order was entered dismissing this case for want of equity.

Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

42947

EDWARD ALTMAN,

Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Edward Altman, as a former policyholder and member of the Metropolitan Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Metropolitan Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

EDWARD ALTMAN,

Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellee.

MR. JUSTICE TUCKER delivered the opinion of the court.

Plaintiff, Edward Altman, as a former policyholder

and member of the Metropolitan Life Insurance Company, brought

this suit in equity against said insurance company on his own

behalf and on behalf of all other former policyholders in the

defendant company who were similarly situated and whom he claimed

to represent. The complaint alleged plaintiff's right and the

right of the other former policyholders to share in the "con-

tingency reserve" fund of the defendant company which had

accrued during the time their policies were in force and paying

for an accounting and an order of distribution to the end that

all former policyholders of the Metropolitan Life Insurance

company might be paid from said "contingency reserve" fund the

amounts they respectively contributed thereto through their

payment of premiums before they voluntarily allowed their policies

to lapse for nonpayment of premiums or had surrendered them for

their cash value or the equivalent thereof in the form of term,

extended or paid-up insurance. Defendant filed a motion to

dismiss plaintiff's complaint on several grounds pursuant to

Sections 45 and 46 of the Civil Practice Act (Pars. 168 and 172,

Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained

the motion. Plaintiff electing to stand on his complaint, a

final order was entered dismissing this case for want of equity.

Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

The special in this case was consolidated for hearing in this court with a similar petition in another case, including case No. 4888. The opinion in case No. 4888 is filed concurrently with this opinion. The defendant's complaint and the grounds asserted in defendant's motion for dismissal in this case are substantially identical with the allegations of the complaint in the other case. In the defendant's motion to dismiss in case No. 4888, the defendant ordered that the case be set aside and the case and the same parties were referred for hearing. The decision in that case (supra) is controlling in this case. Society of the United States is controlling in this case. The reasons stated therein for the order of the Circuit Court dismissing this case for want of equity is affirmed.

Very truly,
Yours,
J. H. H.

Friend and Counsel, J. H. H.

42948

CLARENCE D. SHOCKLEY,

Appellant,

v.

MUTUAL BENEFIT LIFE INSURANCE
COMPANY, a corporation,

Appellee.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

26 I.A. 437²

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Clarence D. Shockley, as a former policyholder and member of the Mutual Benefit Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Mutual Benefit Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for nonpayment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, JJ., concur.

JULY 1, 1943

September 1, 1943

Appellant

Respondent

THE NORTHWESTERN LIFE INSURANCE COMPANY, a corporation

vs.

32314-58

Plaintiff, Grace A. Jenkins, as a former policyholder and member of the Northwestern Life Insurance Company, brought this suit in equity to set aside and annul the assignment and on behalf of all other former policyholders in the defendant company who were similarly situated and who are claimed to be so. The complaint alleges that the assignment was made in violation of the policyholders' right to the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and which was accumulated and set aside in accordance with the terms of the policyholders' contract with the Northwestern Life Insurance Company and from the "contingency reserve" fund the amounts they respectively accumulated hereto through their payment of premiums before they voluntarily allowed their policies to lapse for want of premium or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to sections 48 and 49 of the Civil Practice Act (Laws of 1937 and 1938, Chap. 110, § 48, 1938, and the amendment thereto). Plaintiff elected to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing with this court with appeals perfected in eighteen other cases.

cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, J.J., concur.

cases, including case No. 41883. The opinion in case No. 41883
is filed separately with this opinion. The court in
plaintiff's complaint and the grounds stated therein
motion for dismissal of this case is respectfully submitted
the allegations of the complaint are not supported by the
evidence. In order to obtain an order of dismissal, the
order of dismissal entered in this case and the grounds
case and the grounds stated therein were reviewed. The
decision in that case (United v. [redacted])
Society of the United States is hereby cited as authority
presented here. It is the court's order to dismiss the
order of the District Court is hereby affirmed. The court
equity is affirmed.

WITNESSES:

Friend and Counsel, J. L. [redacted]

42950

December Term, 1943

MAX A. GOLDSMITH,

Appellant,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellee.

Appeal from Cook Circuit.

323.4582

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Max A. Goldsmith, as a former policyholder and member of the Massachusetts Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Massachusetts Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for non-payment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed concurrently

MAX A. GOLDBLITH

Applicant

v.

MASSACHUSETTS LIFE INSURANCE COMPANY, INCORPORATED

Respondent

MASSACHUSETTS COURT OF APPEALS

APPEAL FROM THE DECISION OF THE SUPERIOR COURT IN CASE NO. 42350

Plaintiff, Max A. Goldblith, vs. for his contribution

and member of the respondent, The Mutual Life Insurance Company,

brought this suit to equity which said court found in favor of the

own behalf and on behalf of the respondent and in the

defendant company was held liable for the same and was ordered

to represent. The court found that the plaintiff was entitled

right of the other parties to the insurance policy in the

insurance policy was held in the name of the plaintiff and the

during the time that the policy was in force and was

accounted for and as a result of the plaintiff's action

policy was held in the name of the plaintiff and the

might be paid from the policy and the plaintiff was

respectively contributed to the policy and the plaintiff was

before they voluntarily allowed their policy to be for non-

payment of premium on the policy and the plaintiff was

on the equivalent thereof in the form of a cash value

insurance. Defendant filed a motion to dismiss the

plaint on several grounds and the court found in favor of the

Civil Practice Act (Mass. Ins. Co. v. Goldblith, 1943)

and the chancellor sustained the motion. The plaintiff is

on his complaint, a final order was entered in favor of

went of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in

this court with appeals perfected in eighteen other cases, including

case No. 42353. The opinion in case No. 42353 is filed concurrently

with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, J.J., concur.

[illegible]

December Term, 1943

Appeal from Cook Circuit.

Appellee.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Samuel J. Bennett, as a former policyholder and member of the Minnesota Mutual Life Insurance Company, brought this suit in equity against said insurance company on his own behalf and on behalf of all other former policyholders in the defendant company who were similarly situated and whom he claimed to represent. The complaint alleged plaintiff's right and the right of the other former policyholders to share in the "contingency reserve" fund of the defendant company which had accrued during the time their policies were in force and prayed for an accounting and an order of distribution to the end that all former policyholders of the Minnesota Mutual Life Insurance Company might be paid from its "contingency reserve" fund the amounts they respectively contributed thereto through their payment of premiums before they voluntarily allowed their policies to lapse for non-payment of premiums or had surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to Sections 45 and 48 of the Civil Practice Act (Pars. 169 and 172, Chap. 110, Ill. Rev. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case No. 42933. The opinion in case No. 42933 is filed

December 17, 1943

42935

SAAMUEL J. BENNETT,

Appellant,

v.

MINNESOTA MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellee.

64-1556

MR. JUSTICE

Plaintiff, Samuel J. Bennett, as a former policyholder and member of the Minnesota Mutual Life Insurance Company, brought this suit to equity against said insurance company on the ground that and on behalf of all other former policyholders in the defendant company who were similarly situated, to compel the company to represent the completed policyholders in the right of the other former policyholders in the company's "agency reserve" fund at the same time and in the same manner as the time their policies were in force and effect, in accounting and in order of distribution to the end that all former policyholders of the Minnesota Mutual Life Insurance Company be paid from the "contingency" reserve fund the same as the respective completed policies through that fund as of the time before they voluntarily allowed their policies to lapse for non-payment of premiums or not surrendered them for their cash value or the equivalent thereof in the form of term, extended or paid-up insurance. Defendant filed a motion to dismiss plaintiff's complaint on several grounds pursuant to sections 44 and 46 of the Civil Practice Act (Mars. 109 and 110, Minn. Stat. 1943) and the chancellor sustained the motion. Plaintiff electing to stand on his complaint, a final order was entered dismissing this case for want of equity. Plaintiff appeals from this order.

The appeal in this case was consolidated for hearing in this court with appeals perfected in eighteen other cases, including case no. 42935. The opinion in case no. 42935 is filed

concurrently with this opinion. The allegations of plaintiff's complaint and the grounds asserted in defendant's motion for dismissal in this case are practically identical with the allegations of the complaint and the grounds asserted in the defendant's motion to dismiss in case No. 42933. The final order of dismissal entered in that case was the same as in this case and the same questions were presented for review. Our decision in that case (Lubin v. The Equitable Life Assurance Society of the United States) is controlling as to the questions presented here and for the reasons stated therein the final order of the Circuit court dismissing this cause for want of equity is affirmed.

AFFIRMED.

Friend and Scanlan, J.J., concur.

concomitantly with this opinion. The court also stated that the
complaint of the "corrupt practices" in the case was
dismissed in this case and that the court was not
satisfied of the complaint and the court was not
satisfied to decide in case 12, 1935. The court was not
satisfied in this case and the court was not
satisfied with the complaint and the court was not
(Appendix 7. The following are the names of the persons
is contained in the list of the persons who
persons stated therein and the court was not
satisfied with the case for the purpose of the court.

Persons who are not in the list of the persons who

42973

ANNA PIETROLONARDO,
Appellant,

v.

JAY R. HOUGHTELING, HELEN HOUGHTEL-
ING and PIONEER TRUST AND SAVINGS
COMPANY, a corporation,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Jay R. Houghteling and his wife Helen were owners of a two-story building on Fullerton avenue in Chicago which was maintained and managed for them by the Pioneer Trust and Savings Bank. The building consisted of a store with an apartment above, which was occupied under a month-to-month tenancy by plaintiff's family, including her married son. Plaintiff fell and was injured on a stairway leading from the vacant store to the basement of the building. She brought suit against the Houghtelings as owners and the bank as manager of the premises. Plaintiff alleged and adduced evidence of a special agreement with the manager of the premises, that she was an invitee in the use of the stairway, which was carelessly and negligently maintained in a dangerous and unsafe condition. The first trial resulted in a verdict and judgment against all defendants for \$7500, from which they appealed. We were of the opinion (314 Ill. App. 568, abst. opinion) that the verdict was contrary to the manifest weight of the evidence and entered an order reversing the judgment and remanding the cause for retrial. On the second trial substantially the same evidence was adduced on behalf of plaintiff but certain impeaching evidence introduced by defendants upon the first trial, was omitted, thus constituting a stronger case in

ANNA HETTERICH, Plaintiff,

v.

JAY R. HOUTGILL, HENRY HOUTGILL, ING AND ELOISE TRUST AND SAVING COMPANY, a corporation, Appellees.

MR. JUSTICE ROBERT H. HALL, JR. delivered the opinion of the court.

Jay R. Houtgill and his wife Helen were owners of a two-story building on Madison Avenue in Chicago which was maintained and managed for them by the Houtgill Trust and Savings Bank. The building consisted of a store with an apartment above which was occupied under a month-to-month tenancy by Plaintiff's family, including her married son. Plaintiff sold and was injured on a stairway leading from the vacant store to the basement of the building. She brought suit against the Houtgills as owners and the bank as manager of the premises. Plaintiff alleged and adduced evidence of a special agreement with the manager of the premises, that she was an invitee in the use of the stairway, which was carelessly and negligently maintained in a dangerous and unsafe condition. The first trial resulted in a verdict and judgment against all defendants for \$7500, from which they appealed. We were of the opinion (314 Ill. App. 582, 583, 584) that the verdict was contrary to the manifest weight of the evidence and entered an order reversing the judgment and remanding the cause for retrial. On the second trial and substantially the same evidence was adduced on behalf of Plaintiff but certain impeaching evidence introduced by defendants upon the first trial, was omitted, thus constituting a stronger case in

2.

her favor than upon the first trial. The second jury awarded her \$14,700. Defendants thereupon filed a motion for judgment on special findings of the jury, a motion for judgment notwithstanding the verdict, and a motion for a new trial. The motion for judgment on the special findings was overruled, the motion for a new trial was denied, but the motion for judgment notwithstanding the verdict was allowed, and judgment was entered thereon in favor of defendants. In rendering judgment notwithstanding the verdict the court filed a memorandum opinion holding in effect that it was ^{not} a common stairway, that plaintiff was not an invitee but a permittee, and that the latter relationship did not impose any obligation upon the landlord to keep the premises so permissibly used, in repair for the permitted purpose.

After a careful review of the record we think the court erred in concluding that plaintiff was precluded from recovery as a matter of law. Plaintiff adduced evidence of her right to use the inner stairway in lieu of the unusable rear stairway as a part of the original leasing, and without which no lease would have been made. Whether she had the right by express permission to enter upon the stairway, and was therefore an invitee, or whether she was accomplishing a task of her own or one for the mutual benefit of herself and the defendants, were questions of fact for the jury; and although the evidence seemed insufficient upon the first trial to support a verdict, it was not intended in reversing the judgment and remanding the case for retrial, that the rights of the parties should be terminated as a matter of law without giving effect to the findings of the jury. The Supreme court recently expressed its view on the functions of the jury as a fact-finding body in the case of People v. Hanisch, 361 Ill. 465, as follows: "Whatever may be the rule in certain other juris-

her favor than upon the first trial. The second jury awarded her \$14,700. Defendants thereupon filed a motion for judgment on special findings of the jury, a motion for judgment notwithstanding the verdict, and a motion for a new trial. The motion for judgment on the special findings was overruled, the motion for a new trial was denied, but the motion for judgment notwithstanding the verdict was allowed, and judgment was entered thereon in favor of defendants. In rendering judgment notwithstanding the verdict the court filed a memorandum opinion holding in error that it was ^{not} a common stairway, that plaintiff was not an invitee but a permittee, and that the latter relationship did not impose any obligation upon the landlord to keep the premises so dangerously used, in repair for the permitted person.

After a careful review of the record we think the court erred in concluding that plaintiff was precluded from recovery as a matter of law. Plaintiff adduced evidence of her right to use the inner stairway in lieu of the unstable rear stairway as a part of the original lease, and without which no lease would have been made. Whether she had the right by express permission to enter upon the stairway, and was therefore an invitee, or whether she was accomplishing a task of her own or one for the mutual benefit of herself and the defendants, were questions of fact for the jury; and although the evidence seemed insufficient upon the first trial to support a verdict, it was not intended in reversing the judgment and remanding the case for retrial, that the rights of the parties should be terminated as a matter of law without giving effect to the findings of the jury. The Supreme court recently expressed its view on the functions of the jury as a fact-finding body in the case of People v. Harrison, 361 Ill. 463, as follows: "Whatever may be the rule in certain other juris-

3.

dictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgment of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

Two juries have now resolved the issues in favor of plaintiff, the second jury almost doubling the verdict of the first, probably as ^{the} result of the testimony of Alphonse Pietrolonardo, plaintiff's husband, who injected into the record, although it may have been inadvertently done, a reference to insurance. If the present judgment were to be reversed and the cause again remanded for a new trial, it is fair to assume that substantially the same evidence would be presented to a third jury, and in accordance with the established policy of the reviewing courts, "where there have been two or more verdicts in a case for the same party and there is any evidence to sustain the judgment appealed from, appellate courts are very reluctant to disturb it." Norkevich v. Atchison T & S. F. Ry. Co., 263 Ill. App. 1.

However, we have concluded that the sum of \$7500 assessed by the first jury, is ~~ample~~ compensation for the injury sustained, which was a fractured arm, and therefore if plaintiff will consent to a remittitur of \$7200 within ten days, the judgment notwithstanding the verdict will be reversed and the cause remanded with directions to enter judgment on the verdict for

directions, we firmly adhere to our often-stated belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. It is not for the court to sit as a jury, as it were, and there would be little use for the jury system, as a fact-finding body, if of such importance that an amendment of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury.

Two parties have now resolved the issues in favor of Plaintiff, the second jury almost doubling the verdict of the first, probably as a result of the testimony of Plaintiff's husband, who injected into the record, although it may have been inadvertently done, a reference to insurance. If the present judgment were to be reversed and the case remanded for a new trial, it is fair to assume that substantially the same evidence would be presented to a third jury, and in accordance with the established policy of the reviewing courts, "where there have been two or more verdicts in a case for the same party and there is any evidence to sustain the judgment appealed from, appellate courts are very reluctant to disturb it." Norovich v. Johnson, 163 F.2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

4.

the reduced amount; otherwise the judgment will be reversed and the cause remanded for a new trial.

UPON CONSENT TO A REMITTITUR OF
\$7200 WITHIN TEN DAYS JUDGMENT
NOTWITHSTANDING THE VERDICT
REVERSED AND THE CAUSE REMANDED
WITH DIRECTIONS TO ENTER JUDGMENT
FOR THE REDUCED AMOUNT; OTHERWISE,
JUDGMENT TO BE REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Scanlan, J., concur.

the reduced amount of the same; and the cause thereof for a further

of the same; and the cause thereof for a further

of the same; and the cause thereof for a further

43393

T. L. MILLER,
Appellee,

v.

UNION STATE INVESTMENT
COMPANY, a corporation,
UNION INVESTMENT COMPANY,
a trust, JULIUS F. SMETANKA,
VIRGINIA PREBIS, also known as
Mrs. Eugene Tabero, also known
as Mrs. Eugene Taber, EUGENE
TABERO, also known as Eugene
Taber, and MAX BUZIK,
Defendants.

On Appeal of UNION STATE
INVESTMENT COMPANY, a
corporation,
Appellant.

344 A
APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY FROM
INTERLOCUTORY ORDER
APPOINTING A RECEIVER.

326 1-4 460

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of the Circuit court appointing a receiver for Union State Investment Company, a corporation.

It appears from the complaint that November 2, 1938 Charles H. Albers, as receiver of the Union State Bank of South Chicago, recovered judgment for the sum of \$48,841.69 and costs in the Municipal court against the defendant, Union Real Estate Agency and Loan Corporation, also known as Union State Investment Company; that while said judgment was in full force and effect Albers, for the purpose of securing satisfaction thereof, sued out a writ of execution on November 9, 1938 which was returned "no part satisfied"; that the judgment is still in full force and effect and has not been paid; that prior to the filing of the complaint defendant had ceased doing business and was on December 20, 1944 dissolved at the instance of the attorney general for failure to pay its franchise taxes. By means of this proceeding plaintiff seeks to wind up the affairs of the debtor corporation and to collect the judgment, and the complaint

prays for the appointment of a receiver to take possession of defendant's assets during the pendency of the suit and for the issuance of an injunction to restrain the debtor and other persons from disposing of any assets belonging to the corporation. On February 7, 1945 plaintiff served notice upon all of the defendants that application would be made to the court for the appointment of a receiver and the issuance of a restraining order. When the motion was presented the court ordered defendants to file a written answer and set the matters for hearing on February 16, 1945. Julius F. Smietanka, one of the defendants, filed an answer wherein he averred that the corporation was dissolved by order of court prior to the filing of the complaint; that prior thereto it had been engaged in the business of managing real estate, lending and transmitting money, selling insurance and securities at 3026 East 92nd street in Chicago; that Albers' judgment in the Municipal court was based upon certain collateral notes held by the receiver which were secured by stocks, bonds and securities having a face value in excess of the money due on the note; that the judgment had been reduced from proceeds of sale of the securities, the exact amount of the reduction being unknown or unascertained; that Virginia Prebis purchased and obtained title to the premises occupied by the debtor corporation in Chicago on February 19, 1942 and had become the owner thereof; that all the parties interested in the Union State Investment Company were solvent and able to respond in damages, and that they would be irreparably damaged if an injunction were to issue or a receiver to be appointed; that neither the Union State Investment Company, Smietanka, Virginia Prebis, or the other defendants had in their possession or control any property effects of beneficial interest to the debtor

control any property effects of beneficial interest to the debtor
Frieda, or the other defendants had in their possession or
neither the Union State Investment Company, Shastana, Virginia
instructions were to issue or a receiver to be appointed; that
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State Investment Company were solvent and able to respond in
owner thereof; that all the parties interested in the Union
poration in Chicago on February 15, 1944 and had become the
and obtained title to the premises occupied by the debtor cor-
being unknown or unascertained; that Shastana Frieda purchased
of sale of the securities, the exact amount of the redemption
the note; that the judgment had been rendered from proceeds
secured having a face value in excess of the money due on
held by the receiver which were secured by stock, bonds and
in the Municipal Court was dated upon to take collection notes
ties at 3056 West 3rd Street in Chicago; that Shastana Frieda
lending and transacting money, selling insurance and securi-
it had been engaged in the business of running real estate,
Court prior to the filing of the complaint; that prior thereto
he averred that the corporation was dissolved by act of ex-
Shastana, one of the defendants, filed an answer wherein
the petition for relief on February 15, 1944, stating,
Court ordered defendants to file a verified petition and that
of a restraining order. When the motion was granted the
the Court for the appointment of a receiver and the issuance
upon all of the defendants and Shastana Frieda would be made to
corporation. On February 15, 1944, Shastana Frieda received notice
other persons from Shastana Frieda, according to the
the issuance of an injunction to restrain the defendants and
defendants' assets pending the appointment of a receiver and for
to the effect that the Court should have jurisdiction of the

corporation; and he therefore prayed that the motion for a receiver and injunction be denied.

Virginia Prebis also filed an answer by Joseph G. Smietanka as her attorney wherein she disclaimed knowledge as to the obligations of the debtor corporation and of its affairs, and averred that she purchased the real estate of the corporation at 3026 East 92nd street, Chicago, obtained a deed thereto, and assumed all unpaid taxes thereon. Neither the corporation nor any of the other defendants filed an answer to plaintiff's motion, and none of them filed an appearance until March 5, 1945, after the motion had been heard and determined.

The motion came on for hearing February 20, 1945, and the court after reading the complaint and answers there-to entered an order appointing a receiver for the debtor corporation, and directed the issuance of an injunction restraining the corporation, its officers and directors from disposing of any assets held by them which belonged to the debtor corporation. The order directed that plaintiff file a bond for \$1,000 before the injunction order issue. However, no injunction was ever issued. The order inadvertently omitted the specification or provision for a complainant's bond for the appointment of a receiver, and also failed to waive the bond.

Subsequently, February 26, 1945, some seven days before written appearance was entered for the debtor corporation, and six days after the entry of the order appointing the receiver and providing for the issuance of the injunction, counsel appeared on behalf of the debtor corporation and requested the court to fix an appeal bond from the order appointing a receiver and issuing an injunction. March 5, 1945 Union State Investment Company filed a bond which was then approved,

corporation; and he therefore prayed that the motion for a receiver and injunction be denied.

Virginia Frieda also filed an answer by Joseph G. Smitanka as her attorney wherein she disclaimed knowledge as to the obligations of the debtor corporation and of its affairs, and averred that she possessed the real estate of the corporation at 3036 West 13th Street, Chicago, obtained a deed thereto, and assumed all unpaid taxes thereon, neither the corporation nor any of the other defendants filed an answer to plaintiff's motion, and none of them filed an appearance until March 7, 1945, after the motion had been heard and determined.

The motion came on for hearing February 26, 1945, and the court after reading the complaint and answers thereto entered an order appointing a receiver for the debtor corporation, and directed the issuance of an injunction restraining the corporation, its officers and directors from disposing of any assets held by them which belonged to the debtor corporation. The order directed that plaintiff file a bond for \$1,000 before the injunction order issued. However, no injunction was ever issued. The order inadvertently omitted the specification or provision for a complainant's bond for the appointment of a receiver, and also failed to waive the bond.

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and the following day plaintiff's counsel served notice to all attorneys of record informing them that plaintiff would appear March 8, 1945 and request the court to modify the order entered February 20 so as to withdraw the motion for the issuance of the injunction to make provision for the filing of complainant's bond and to tender that bond and have it approved instanter. When the motion came on for hearing March 8, 1945, plaintiff's counsel and the attorney for the debtor corporation both being present, the court was evidently under the impression that the order of February 20 appointing a receiver provided for the filing of a bond by complainant, but plaintiff's counsel argued that there was no such provision and therefore upon instructions of the court, the files were procured from the clerk's office and disclosed that the order made no provision that plaintiff file a bond, or that the bond be waived. During the discussion counsel for the debtor corporation left the court room, and plaintiff's attorney was instructed to return March 9, the following day. On that day Joseph G. Smietanka, who was associated with Charles D. Snewind, attorney for the corporation, appeared in court, as did also plaintiff's counsel. Mr. Smietanka objected to the modification of the order entered February 20; whereupon the court stated that it was his intention originally to provide for complainant's bond for the appointment of a receiver, but that such provision was inadvertently omitted from the written order. After argument by counsel on both sides, the court allowed the motion to withdraw the original request for the issuance of the injunction and also amended the order of February 20 nunc pro tunc so as to provide for a complainant's bond. Plaintiff then and there instanter filed the required complainant's bond for the appointment of a receiver,

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and the same was approved by the court.

The two questions presented for consideration are: (1) whether the order of February 20, 1945 appointing a receiver was effectively and properly amended nunc pro tunc on March 9, 1945, and (2) whether this was a proper case for the appointment of a receiver pendente lite.

We think the case of Central Trust Co. v. McGurn, 257 Ill. App. 45, is determinative of the first question. The opinion, concurred in by all the justices of the three divisions of the Appellate court, held that if the case is a proper one for the appointment of a receiver, such appointment will be upheld although the order appointing the receiver may be erroneous in some respects. In that proceeding defendant was notified that an application would be made for the appointment of a receiver. The motion was heard on the verified bill of complaint. The original order there entered on December 19, 1929 failed to provide for a complainant's bond, nor did it waive the filing thereof. Like the case at bar, the order there was amended during term time, December 31, 1929, and for good cause shown the court excused the giving of the bond. It was there contended, as it is in this proceeding, that the court was without power to appoint a receiver without first requiring complainant to give a bond, unless the giving of such bond was dispensed with in the order of appointment, as required by paragraph 55, chapter 22, Cahill's 1929 Statutes, and that since the order appointing a receiver failed to provide that no bond need be given by the complainant, the order was erroneous and should be reversed. The court pointed out that an order appointing a receiver must comply with the provisions of the statute,

but on the authority of several cases cited in the decision, held that "it would have been an idle and useless ceremony to reverse the order because it was not in accordance with the statute where no purpose would be served by doing so. The law never requires the doing of a useless act." In Redington v. Craig, 270 Ill. App. 163, the court held it proper to amend a decree appointing a receiver nunc pro tunc even after term time, and in Walker v. Kersten, 115 Ill. App. 130, the court refused to vacate an order appointing a receiver even though the complainant did not give bond as required by statute, because "the case was a proper one for the appointment of a receiver" and "the error [failure to provide for complainant's bond] was not harmful." In Chicago Title and Trust Co. v. Johnson, 268 Ill. App. 184, a like result was attained upon the authority of the McGurn case. In our opinion the case at bar is even stronger than the McGurn case because the filing of a bond was not excused but was actually required and the bond filed, thus giving defendant the security contemplated by the statute.

As to the remaining question, namely, whether this was a proper case for the appointment of a receiver, we find from the allegations of the complaint that plaintiff is a judgment creditor; that an execution issued "no part satisfied"; that the corporation had recently been dissolved; and that certain assets were fraudulently conveyed. These essential facts being alleged and admitted, both the statute and the authorities in this state justified the appointment of a receiver. Section 86 of chapter 32, Ill. Rev. Stat. 1943, vests courts of equity with full power to liquidate the assets and business of a corporation "upon the suit of a creditor whose claim has either been reduced to judgment

but on the authority of several cases cited in the decision, held that "it would have been an idle and useless ceremony to reverse the order because it was not in accordance with the statute where no purpose would be served by doing so. The law never requires the doing of a useless act. In Redington v. Smith, 70 Ill. 2d, 111, 112, the court held it proper to award a decree appointing a receiver and the court even after term time, and in Smith v. Redington, 111 Ill. 2d, 130, the court refused to award an order appointing a receiver even after the court had given bond as required by statute, because "the case was a new one for the appointment of a receiver" and the court declined to provide for completion of bond. In Smith v. Redington, 111 Ill. 2d, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

and an execution thereon returned unsatisfied, or whose claim is admitted by the corporation, when in either case it is made to appear that the corporation is unable to pay its debts and obligations in the regular course of business as they mature"; and section 87 of the same statute provides that "in proceedings to liquidate the assets and business of a corporation the court shall have all the ordinary powers of a court of equity to issue injunctions, to appoint a receiver or receivers pendente lite with such powers and duties as the court, from time to time, may direct, and to take such other proceedings as may be requisite to preserve the corporate assets and carry on the business of the corporation until a full hearing can be had." In Lindgren-Mahan Co. v. Revere Rubber Co., 70 Ill. App. 379, the court appointed a receiver for an insolvent corporation. The complaint contained no prayer that the receiver should take possession of any specific property. As in the case at bar, the debtor corporation alone appealed the receiver's appointment and the interlocutory order was affirmed. The court said that "it was simply the case of the appointment of a receiver of an insolvent corporation which had ceased to do business leaving debts unpaid, and had nothing left to it in the way of tangible assets subject to execution." Peterson Co. v. Ashphalt Sales Corp., 235 Ill. App. 592, sustains the contention that a receiver pendente lite may be appointed upon a creditor's suit against a corporation where a judgment execution has been issued, demand made, the execution returned "no part satisfied," and the judgment still in force and effect, the corporation having ceased doing business and being hopelessly insolvent.

For the reasons indicated we think the order appointing a receiver should be affirmed, and it is so ordered.

ORDER AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

Sullivan, P. J., and Sceniar, J., concur.
ORDER AFFIRMED.
For the reasons indicated we think the order appointing a receiver should be affirmed, and it is so ordered.
Insolvent.
Corporation having ceased doing business and being hopelessly
"fired," and the judgment still in force and effect, the cor-
poration having ceased doing business and being hopelessly
insolvent.
against a corporation where a judgment execution has been
issued, demand made, the execution returned "no part satis-
fied," and the judgment still in force and effect, the cor-
poration having ceased doing business and being hopelessly
insolvent.
assets subject to execution." Western Union Telegraph Corp.,
235 Ill. App. 3d, 328, 329, 330, 331, 332, 333, 334, 335, 336,
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43297

PAUL LENCHARD,
Appellee,

v.

THOMAS J. FRIEL and CHARLES
C. RENSHAW, as Trustees, etc.,
et al., doing business as
CHICAGO SURFACE LINES, and
M. J. O'BRIEN,
Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover damages for personal injuries sustained by him when, as he alleges, a northbound Halsted street car drove into the rear of his automobile as it was standing on the track at 55th street (also known as Garfield boulevard). A jury returned a verdict finding defendants guilty and assessing plaintiff's damages at \$3,000. Defendants appeal from a judgment entered upon the verdict.

Defendants do not contend that the amount of damages awarded by the jury is excessive. Their first contention is that the verdict is against the manifest weight of the evidence and that the trial court erred in refusing them a new trial. The accident occurred on May 10, 1941, about 3 p. m., at the intersection of the westbound drive on Garfield boulevard with Halsted street. Halsted street runs north and south and is about fifty feet wide. Garfield boulevard runs east and west and has two drives, one for westbound traffic and another for eastbound traffic. The drives are separated by a parkway seventy-five feet wide; each drive is about forty or forty-five feet wide. Just prior to the accident plaintiff was driving north on Halsted street and intended to proceed north on that street until he reached Chicago avenue, which is a number of miles from the place of the accident. Plaintiff's

SAUL KATZ

Appellee

Plaintiff

vs.

THE CHICAGO & NORTH
WESTERN RAILROAD
CO., INC.,
Plaintiff

Case No. 10,000

Filed for record and return to the court

on the 10th day of May, 1927.

Subscribed and sworn to before me

on this 10th day of May, 1927.

Notary Public in and for the State of Illinois

My commission expires on the 10th day of May, 1928.

Witness my hand and seal of office

this 10th day of May, 1927.

Notary Public in and for the State of Illinois

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theory of fact was that as he reached the eastbound drive of Carfield boulevard he had the green light but that as he reached the westbound drive the amber light showed and he slowed down; that at the same time a westbound automobile on 55th street turned north on Halsted; that he brought his car to a smooth stop; that about six or seven seconds thereafter, and while his automobile was "standing still," a northbound Halsted street car struck the rear of his automobile. Defendants' theory of fact was that as the northbound Halsted street car was crossing 55th street and was approaching the south side of the westbound drive plaintiff's automobile passed the street car on its east side and cut in or swerved to the left in front of the street car and that the automobile swerved so close to the street car that it was impossible for the motorman to stop the street car before it collided with the automobile. There was evidence that supported each theory of fact. The case was bitterly contested and each side sought to impeach certain witnesses called by the other side. After a careful examination of the entire evidence we are satisfied that we would not be justified in sustaining the instant contention of defendants. The jury saw and heard the witnesses and had a much better opportunity than we have to determine the credibility of the witnesses and the weight, if any, that should be attached to their testimony. This case, in our judgment, was peculiarly one for a jury to decide. The trial judge approved the verdict of the jury. As was said in People v. Hanisch, 361 Ill. 465, 468: "Whatever may be the rule in certain other jurisdictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. If it were not so there would be little use

for the jury system. The jury, as a fact-finding body, is of such importance that an abridgment of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

Defendants contend that the trial court erred in refusing to give defendants' instruction No. 24. The subject matter of this instruction was, in substance, fairly covered by defendants' given instruction No. 7. The strained argument of defendants that there is a material difference between the two instructions is not persuasive. We find no merit in defendants' contention that the trial court erred in refusing their instruction No. 25, as the subject matter of the instruction was covered by defendants' instructions Nos. 5 and 11.

Defendants contend that the court erred in refusing their instruction No. 34. That instruction reads as follows: "The happening of an accident does not raise a presumption of negligence on behalf of the defendants, but the burden is on the plaintiff to show by a preponderance or greater weight of the evidence, under the instructions of the court, that the accident in question was the proximate result of the negligence charged, and that the plaintiff was at and before the time and place in question in the exercise of ordinary care for his own safety." (Italics ours.) Defendants contend that the law stated in that part of the instruction that we have italicized is a correct rule of law; that it was not given in any other instruction, and defendants were prejudiced by the failure of the court to give it. Defendants concede that the italicized part of the instruction has been condemned

For the jury system. The jury, as a fact-finding body, is of such importance that an abandonment of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The wisest caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

Defendants contend that the trial court erred in refusing to give defendants' instruction No. 24. The subject matter of this instruction was, in substance, fairly covered by defendants' given instruction No. 7. The assigned argument of defendants that there is a material difference between the two instructions is not persuasive. A finding no merit in defendants' contention that the trial court erred in refusing their instruction No. 24, as the subject matter of the instruction was covered by defendants' instructions Nos. 7 and 11.

Defendants contend that the court erred in refusing their instruction No. 24. That instruction reads as follows: "The happening of an accident does not raise a presumption of negligence on behalf of the defendant, but the burden is on the plaintiff to show by a preponderance of greater weight of the evidence, under the instructions of the court, that the accident in question was the proximate result of the negligence charged, and that the plaintiff was at and before the time and place in question in the exercise of ordinary care for his own safety." (Italics ours.) Defendants contend that the law stated in that part of the instruction that we have italicized is a correct rule of law; that it was not given in any other instruction; and defendants were prejudiced by the failure of the court to give it. Defendants concede that the italicized part of the instruction has been condemned

in a number of cases, but they contend that the Supreme court definitely held in Huff v. I. C. R. R. Co., 362 Ill. 95, 101, that "The mere happening of the accident raises no presumption that it was caused by negligence," and defendants argue that under that ruling the refusal of the instruction was reversible error. In Kovacs v. Richardson, 306 Ill. App. 194, 198, we said:

"As to proposition 3: Defendants contend that the court erred in refusing to give the following instruction requested by them: '21. If you believe from the evidence that the injury to the plaintiff, if she was injured, was the result of a mere accident which occurred without negligence on the part of the defendants as charged in the complaint, or in some count thereof, then the defendants are not liable in this case.' Under the facts of the instant case this instruction could only confuse and mislead the jury. That was its plain purpose. In the case of Streeter v. Humrichouse, 357 Ill. 234, Mr. Justice Farthing hit the nail on the head when he held that an instruction like the one in question should not be given in a case unless there was evidence that a plaintiff was injured through accident, alone. In the instant case, if the accident to plaintiff occurred through the negligence of defendants, or through the negligence of plaintiff, or through the negligence of plaintiff and defendants, the injuries to plaintiff would not be caused by 'a mere accident.'"

In the instant case defendants made no claim that the injuries to plaintiff were caused by "a mere accident," nor was there any evidence in the case upon which such a claim could be based. Indeed, defendants, in their brief, argue that the sole cause of the accident was the negligent conduct of plaintiff. As we stated in the Kovacs case, "Under the

facts of the instant case this instruction could only confuse and mislead the jury. That was its plain purpose." In the Huff case, upon which defendants rely, there was no evidence introduced by the plaintiff to prove the cause of the accident, and the court held that under such a state of the record the mere happening of the accident raised no presumption that it was caused by negligence.

Defendants contend that the trial court erred in refusing their instruction No. 36. That instruction reads as follows: "The fact that the court has given any instructions on the subject of plaintiff's damages or injuries, or that defendants' counsel has discussed such subject is not to be taken by you as any intimation by the court or as any admission by the defendants of the defendants' liability for the injury complained of." (Italics ours.) Defendants concede that the unitalicized part of the instruction was included in a special instruction drafted by the trial court, but they contend that that instruction failed to include the italicized part of instruction No. 36 and that such failure constituted reversible error. The able counsel for defendants are unable to cite any case that supports their contention.

Defendants contend that the trial court erred in refusing to give their instruction No. 27. As to this contention it is sufficient to say that the instruction relates solely to the question of damages, and as defendants make no point in their brief that the damages awarded were excessive, we fail to see how the refusal to give instruction No. 27 could have harmed them.

The last contention raised by defendants is that the trial court committed error in permitting three reports to be taken to the jury room. A report made by Officer O'Brien, a witness for defendants, was admitted in evidence as

facts of the instant case this instruction would be correct and misled the jury. That was the result. In the Smith case, upon which defendant relies, there was no error introduced by the instruction to prove the cause of the accident and the court held that error such a study of the record and were happening of the accident raised no question that it was caused by negligence.

Defendants contend that the trial court erred in refusing their instruction No. 24. That instruction reads as follows: "The fact that the court has given any instructions on the subject of defendant's defense of accident, or that defendant's counsel has discussed said defense to the jury, taken by you as any instruction by the court on any subject."

Defendants by the instruction of the defendant's counsel for the injury complained of." (Trial court.) Defendants concede that the instruction was of the defendant's defense included in a special instruction given by the trial court, but they contend that that instruction failed to include the material part of instruction No. 24, and that such failure constituted reversible error. The same counsel for defendants are unable to cite any case that supports their contention.

Defendants contend that the trial court erred in refusing to give their instruction No. 27. As to this contention it is sufficient to say that the instruction relates solely to the question of damages, and as to damages there is no point in their brief that the damages awarded were excessive, we fail to see how the refusal to give instruction No. 27 could have harmed them.

The last contention raised by defendants is that the trial court committed error in permitting three reports to be taken to the jury room. A report made by Officer O'Brien, a witness for defendants, was admitted in evidence as

defendants' exhibit 1; a report made by Officer Keating, a witness for plaintiff, was admitted in evidence as plaintiff's exhibit 2; and a report made by plaintiff to his insurance company was admitted in evidence, by agreement, as exhibit A. Defendants contend that these reports were admissible only for the purpose of impeachment and that it was error to permit them to be taken to the jury room. After a careful examination of that part of the record that bears upon this contention it seems clear to us that counsel for defendants and counsel for plaintiffs agreed that the exhibits should go to the jury. Indeed, it appears that at the time they were offered counsel for defendants was anxious to have them go to the jury. After the closing arguments had been made to the jury, but before the jury retired, counsel for defendants then sought to avoid the agreement and objected to the exhibits' going to the jury. The trial court held that there had been an agreement between counsel that the exhibits should go to the jury, and that the parties were bound by the agreement. The trial court, in our judgment, was justified in so holding.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

Defendants' exhibit 1; a report made by Officer Manning, a witness for Plaintiff, was admitted in evidence as Plaintiff's exhibit 2; and a report made by Plaintiff to the Insurance Company was admitted in evidence, by agreement, as exhibit 3. Defendants contend that these reports were inadmissible only for the purpose of impeachment and that it was error to admit them to be taken to the jury room. After a careful examination of that part of the record that bears upon this contention it seems clear to us that counsel for Defendants and counsel for Plaintiff agreed that the exhibits should go to the jury. Indeed, it appears that at the time they were offered counsel for Defendants was anxious to have them go to the jury. After the closing arguments had been made to the jury, but before the jury retired, counsel for Defendants then sought to avoid the agreement and objected to the exhibits going to the jury. The trial court held that there had been an agreement between counsel that the exhibits should go to the jury, and that the parties were bound by the agreement. The trial court, in our judgment, was justified in so holding.

The judgment of the Superior Court of Cook County is

affirmed.

JUDGMENT AFFIRMED.

GULLIVAN, P. J., and FRANK, J., concur.

Abstract

43297

PAUL LENCHARD,
Appellee,

v.

THOMAS J. FRIEL and
CHARLES C. RENSHAW, as
Trustees, etc., et al.,
doing business as
CHICAGO SURFACE LINES,
and M. J. O'BRIEN,
Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

ADDITIONAL OPINION UPON PETITION FOR REHEARING.

In their petition for rehearing defendants state that as it was a bitterly contested case "it is vitally important that the giving and refusal of instructions be free from error and if any error appears therein, the judgment should be reversed," and they ask us to reconsider two points urged by them in their brief: (1) the refusal of the court to give defendants' instruction No. 34, and (2) the refusal of the court to give defendants' instruction No. 27. As to refused instruction No. 34, defendants now argue: "The court misconstrued the meaning and purpose of this instruction. This instruction deals solely with presumption and burden of proof. This instruction does not concern 'mere accident without negligence' nor is it a 'mere fact' instruction"; that "The words 'the accident' in the instant instruction means 'the occurrence', regardless of whether it may have been or may not have been, in fact, caused by negligence. It has no reference to 'a mere accident' which occurred without negligence nor does the instruction undertake to state whether the defendants are or are not liable because of it. It deals solely with presumption and burden of proof." It is sufficient

Abstract

43227

PAUL LEMMON, JR.

Defendant,

v.

THOMAS L. BROWN and
CHAS. L. BROWN, JR., as
trustees, etc., et al.,
doing business as
CHAS. L. BROWN, JR.,
and M. J. BROWN,
Appellants.

APPEAL FROM JUDICIAL

COURT OF COV. COUNTY.

THE JUDICIAL COUNCIL HAS REVIEWED THE RECORD OF THIS CASE.

ADDITIONAL POINTS FOR REVIEW.

In their petition for rehearing defendants state

that as it was a bitterly contested case "it is vitally

important that the giving and refusal of instructions be

free from error and if any error appears therein, the

judgment should be reversed," and they ask us to reconsider

two points raised by them in their brief: (1) the refusal

of the court to give defendants' instruction No. 24, and

(2) the refusal of the court to give defendants' instruction

No. 27. As to refused instruction No. 24, defendants no

argue: "The court misconstrued the meaning and purpose of

this instruction. This instruction deals solely with

presumption and burden of proof. This instruction does

not concern 'mere accident without negligence' nor is it

a 'mere fact' instruction; that 'The words 'the accident'

in the instant instruction means 'the occurrence', 'land-

less of whether it may have been or may not have been, in

fact, caused by negligence. It has no reference to a

'mere accident' which occurred without negligence nor does

the instruction undertake to state whether the defendants

are or are not liable because of it. It deals solely

with presumption and burden of proof." It is sufficient

to say in answer to this argument that if the instruction was intended to deal solely with presumption and burden of proof that subject matter was fully covered in defendants' instructions Nos. 11 and 14, that were given to the jury. Instruction No. 11 reads as follows: "11. The plaintiff cannot recover at all in this case against the defendants unless you believe that the plaintiff has proved by a preponderance of the evidence each of the following propositions: 1. That the plaintiff sustained the injury to his person as charged; 2. That the alleged injury of which plaintiff now complains was not brought about or contributed to by any failure on his part to exercise ordinary care for his own safety at and just before the time of the accident in question; 3. That the defendants were guilty of negligence in the manner charged; 4. That such negligence of the defendants was the proximate or direct cause of plaintiff's alleged injury in question; And if you find from the evidence that the plaintiff has failed to prove by a preponderance of the evidence these propositions as stated, or that he has failed to so prove any of them, he cannot recover against the defendants, and you should find the defendants not guilty." Instruction No. 14 reads as follows: "14. The plaintiff is required by law to prove his case by a preponderance of the evidence before he can recover. If the plaintiff in this case has not so proved his case, or if the evidence is evenly balanced and you are unable to say on which side is the preponderance, then, in either of these cases, the verdict should be not guilty." As to the argument that the words "the accident" in the instruction

to say in answer to this argument that it is instruction
was intended to deal solely with presumption and burden of
proof that subject matter was fully covered in defendant's
instructions Nos. 11 and 12, that were given to the jury.
Instruction No. 11 reads as follows: "11. The plaintiff
cannot recover unless he can first prove against the defendant
unless you believe that the plaintiff has proved by a
preponderance of the evidence each of the following
propositions: 1. That the plaintiff sustained the
injury to his person as a result of the alleged
injury of which plaintiff now complains and not brought
about or contributed to by any fault on his part to
exercise ordinary care for his own safety; and that
before the time of the accident in question; 2. That
the defendants were guilty of negligence in the manner
charged; 3. That such negligence of the defendants was
the proximate or direct cause of plaintiff's alleged injury
in question; and 4. You find from the evidence that the
plaintiff has failed to prove by a preponderance of the
evidence these propositions as stated, or that he has
failed to so prove any of them, he cannot recover against
the defendants, and you should find the defendants not
guilty." Instruction No. 12 reads as follows: "12. The
plaintiff is required by law to prove his case by a
preponderance of the evidence before he can recover. If
the plaintiff in this case has not so proved his case,
or if the evidence is evenly balanced and you are unable
to say on which side is the preponderance, then, in either
of these cases, the verdict should be not guilty." As to
the argument that the words "the accident" in the instruction

should be interpreted to mean "the occurrence," we may say that as the use of the words "the mere accident" and "the accident" have been so often criticised in cases where the collision did not occur on account of an accident but was due to the negligence of one or more of the parties, it seems strange that the able counsel for defendants did not use the words "the occurrence" in the instruction. (See the late case of Krawitz v. Levinstein, 320 Ill. App. 618, 624.)

As to defendants' refused instruction No. 27: While defendants apparently concede that they did not contend in their brief that the damages awarded by the jury were excessive, in order that there may be no doubt in the matter we quote from their brief:

"PROPOSITIONS RELIED UPON FOR REVERSAL.

"1. The verdict is against the manifest weight of the evidence.

"2. The court erred in refusing to grant a new trial.

"3. There was error in refusal of instructions.

"4. There was error in permitting reports used for impeachment to be taken to the jury room."

But defendants argue that even if they did not question the amount of the damages awarded by the jury, nevertheless, that fact did not constitute a waiver of errors in instructions on damages. As we stated in our opinion, as defendants made no point that the damages awarded were excessive we fail to see how the refusal to give instruction No. 27 could have harmed them.

The petition for rehearing is denied.

PETITION FOR REHEARING DENIED.

Friend, P. J., and Sullivan, J., concur.

43365

THOMAS J. SCANLAN and
RUBY SCANLAN,

Appellants,

v.

RUBIN GARRICK and DAVID
GARRICK,

Appellees.

246
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Thomas J. Scanlan and Ruby Scanlan, plaintiffs, brought a forcible entry and detainer suit against Rubin Garrick and David Garrick, defendants, to obtain possession of "Apartment No. 3 on the third floor of the building located at 206 South Hamlin Avenue." The case was tried by the court and at the conclusion of the evidence for plaintiffs there was a finding in favor of defendants. Plaintiffs appeal from a judgment entered upon the finding.

Plaintiffs state in their brief: "Why the court dismissed the suit and denied plaintiffs a judgment for possession is wholly beyond our conception and understanding." Defendants have not filed a brief in this court, but as it appeared from the abstract that Dr. Samuel Garrick was the lessee of the apartment and that he is in the armed forces of the Army of the United States, attached to the medical corps, we read the entire transcript of the record in this cause and as a result we found no difficulty in understanding why the trial court refused a judgment for plaintiffs.

Mabel E. Clark is the owner of the building in which the apartment is located. On September 17, 1941, she executed a written lease to Dr. Samuel Garrick for the apartment

THOMAS J. SCAMMEL and
RUBY SCAMMEL

Appellants,

vs.

ROBIN GARLICK and DAVID
GARLICK

Appellees.

THE JUSTICE SCAMMEL BUILDING, 206 NORTH LAMAR AVENUE, CHICAGO, ILL.

Thomas J. Scammel and Ruby Scammel, appellants,

brought a forcible entry and detainer suit against

Robin Garlick and David Garlick, appellees, to obtain

possession of "Apartment No. 2 on the third floor of

the building located at 206 North Lamar Avenue." The

case was tried by the court and at the conclusion of the

evidence for plaintiffs there was a finding in favor of

defendants. Plaintiffs appeal from a judgment entered

upon the finding.

Plaintiffs state in their brief: "Why the court

dismissed the suit and denied plaintiffs a judgment for

possession is wholly beyond our conception and under-

standing." Defendants have not filed a brief in this

court, but as it appeared from the report that Dr.

Samuel Garlick was the lessee of the apartment and that

he is in the armed forces of the Army of the United

States, attached to the medical corps, we read the entire

transcript of the record in this cause and as a result we

found no difficulty in understanding why the trial court

refused a judgment for plaintiffs.

Mabel E. Clark is the owner of the building in which

the apartment is located. On September 17, 1941, she exe-

cuted a written lease to Dr. Samuel Garlick for the apartment

in question for the period of one year, and the doctor took possession of the apartment. His father, Rubin Garrick, and his brother, David Garrick, lived with him. Sometime after the doctor took possession of the premises he married, and then David married, and their wives also lived in the apartment. Shortly after the doctor took possession of the apartment he enlisted in the armed forces of the United States, was attached to the medical corps, and went overseas. At the expiration of the term of the said lease no new lease was executed nor was there any formal extension of the written lease. The attorneys for the parties agreed that the doctor was a holdover tenant from year to year after the term fixed in the lease had expired. After the doctor enlisted and left Chicago the rent of the apartment was paid promptly by the doctor's wife and was received by Mrs. Clark up to and including the month of September, 1944. In June and July, 1944, Mrs. Clark asked Rubin Garrick and David Garrick "to renew the lease and to take care of the decorating and get things in shape." She testified that they refused to sign a new lease, stating that the doctor's wife would pay the rent, to which Mrs. Clark responded that she wanted security and that they could not stay if they did not sign a lease. Mrs. Clark stated that the rent was always paid "by the doctor. * * * By the doctor's wife." Rent for the months of October and November, 1944, was tendered to Mrs. Clark by the doctor's wife, but Mrs. Clark refused to accept the same. Mrs. Clark further testified that she never served a notice on the doctor for possession of the premises "because he wasn't occupying them." On September 14, 1944, Mrs. Clark executed a written lease of the apartment to plaintiffs for a period of two years, commencing October 1, 1944. Plaintiffs' claim for possession of the apartment is based upon this

in question for the period of one year, and the doctor took possession of the apartment. His father, Nathan Garkick, and his brother, David Garkick, lived with him. Sometime after the doctor took possession of the premises he married, and then David married, and their wives also lived in the apartment. Shortly after the doctor took possession of the apartment he enlisted in the armed forces of the United States, was attached to the medical corps, and went overseas. At the expiration of the term of the said lease no new lease was executed nor was there any formal extension of the written lease. The attorneys for the parties agreed that the doctor was a holdover tenant from year to year after the term fixed in the lease had expired. After the doctor enlisted and left Chicago the rent of the apartment was paid promptly by the doctor's wife and was received by Mrs. Clark up to and including the month of September, 1944. In June and July, 1944, Mrs. Clark asked Nathan Garkick and David Garkick "to renew the lease and to take care of the decorating and get things in shape." She testified that they refused to sign a new lease, stating that the doctor's wife would pay the rent, to which Mrs. Clark responded that she wanted security and that they could not stay if they did not sign a lease. Mrs. Clark stated that the rent was always paid "by the doctor. * * * by the doctor's wife." Rent for the months of October and November, 1944, was tendered to Mrs. Clark by the doctor's wife, but Mrs. Clark refused to accept the same. Mrs. Clark further testified that she never served a notice on the doctor for possession of the premises "because he wasn't occupying them." On September 14, 1944, Mrs. Clark executed a written lease of the apartment to plaintiffs for a period of two years, commencing October 1, 1944. Plaintiffs' claim for possession of the apartment is based upon this

lease. They admitted that when they made the lease they knew that there were parties in possession of the apartment (the Scanlans) and that they are still living in the premises that they occupied at the time that they signed the lease. Mrs. Clark's attorney and "agent for the premises," Leslie H. Whipp, represents the plaintiffs in the instant proceeding. He testified that he served the following notice on "the old gentleman," Rubin Garrick, on July 22, 1944:

"To SAMUEL GARRICK, DAVID GARRICK and RUBIN GARRICK:
Third Apartment
206 South Hamlin Avenue, Chicago, Illinois

"YOU ARE HEREBY NOTIFIED, That your tenancy of the following premises, to-wit: Apartment No. 3 on the 3rd floor of the building located at 206 South Hamlin Avenue, together with the appurtenances thereto belonging situate in the City of Chicago, in the County of Cook, and State of Illinois, will terminate on the 30th day of September A. D. 1944, and you are now hereby required to surrender possession of said premises to me on that day.

"Dated at Chicago, Illinois, this 21st day of July
A. D. 1944.

"Mabel E. Clark
by Leslie H. Whipp her
Attorney in Fact"

On the back is the affidavit of service on Rubin Garrick. It will be noted that no grounds are set up by the landlady as to why she wishes to terminate the tenancy. Mr. Whipp further stated that Rubin Garrick told him that his son "was away some place in war." Plaintiffs, on October 2, 1944, served upon David Garrick and Rubin Garrick a written demand, dated October 1, 1944, for possession of the apartment. Whipp testified that he "terminated the lease." Plaintiffs' counsel, during the trial and in this court, attempts to excuse their failure to make a demand

upon Dr. Garrick for possession of the apartment upon the ground that Dr. Garrick had abandoned the apartment. Nowhere in the brief of plaintiffs is any mention made of the fact that Dr. Garrick, shortly after he went into possession of the apartment, had enlisted in the armed forces of the United States and had been sent overseas, nor is there any mention of the further fact that the doctor's wife was living in the apartment and had been paying the rent. We are told in the brief that "in December, 1941, Samuel Garrick abandoned the premises in question," that "the original lessee [Dr. Garrick] made no claim to the right of possession and the said defendants, Rubin Garrick and David Garrick, were trespassers on said premises." At the commencement of the trial counsel for defendants called the court's attention to the fact that Dr. Garrick was in court, that he was the signer of the lease, and that he had been in possession of the premises for three years, but that plaintiffs had not seen fit to make him a party to the suit. In response to this statement counsel for plaintiffs stated that he thought the evidence would show that the doctor was never in physical possession of the apartment and that plaintiffs were "seeking possession from the party in possession," to which statement counsel for defendants replied that the doctor was in possession of the apartment and that his furniture was in the apartment. At the conclusion of plaintiffs' evidence counsel for defendants stated that Mr. Kearney, of the O. P. A., was present in court and he would like to have Mr. Kearney state his opinion as to whether the notice of termination of the tenancy was suffi-

cient under the rules and regulations of the O. P. A. As no objection was interposed to Mr. Kearney's making a statement to the court, he stated that according to the rules and regulations of the O. P. A. the notice in question was not a good notice; that according to said rules and regulations a tenant in possession paying rent could not be evicted save under certain circumstances, and that the landlord must state in the notice the reason for the termination of the lease and that he must serve with the O. P. A. a copy of the notice. Counsel for plaintiffs thereupon stated that he was proceeding under the Illinois statutes and that the notice was a compliance with the statutes. Reasonable and legal rules and regulations of the O. P. A. are enforceable, and it is not disputed that said rules and regulations specifically provide: "(d) Notices required - (1) Notices prior to action to remove tenant. Every notice to a tenant to vacate or surrender possession of housing accommodations shall state the ground under this section [Housing, Sec. 6, (4)] upon which the landlord relies for removal or eviction of the tenant. A written copy of such notice shall be given to the area rent office within 24 hours after the notice is given to the tenant." The trial court stated that Dr. Garrick should have been made a defendant in the case, and, in our judgment, the court was fully justified in concluding that plaintiffs were attempting to gain an unfair advantage over him by proceeding solely against Rubin Garrick and David Garrick, who were not parties to the lease between Mrs. Clark and the doctor. Counsel for plaintiffs' statement that the doctor had not been in possession of the apartment "since the latter part of 1941 or the forepart of 1942, so the suit for possession

part of 1941 or the forepart of 1942, so the suit for possession had not been in possession of the apartment "since the latter doctor. Counsel for plaintiffs' statement that the doctor who were not parties to the lease between Mrs. Clark and the proceeding solely against Rubin Garlick and David Garlick, were attempting to gain an unfair advantage over him by the court was fully justified in concluding that plaintiffs have been made a defendant in the case, and, in our judgment, tenant." The trial court stated that Dr. Garlick should office within 24 hours after the notice is given to the written copy of such notice shall be given to the area rent landlord relies for removal or eviction of the tenant. A under this section [Housing, Sec. 6, (4)] upon which the possession of housing accommodations shall state the ground tenant. Every notice to a tenant to vacate or surrender Notice required - (1) Notice prior to action to remove said rules and regulations specifically provide: "(4) that the O. P. A. are enforceable, and it is not disputed that statutes. Reasonable and legal rules and regulations of statutes and that the notice was a compliance with the thereupon stated that he was proceeding under the Illinois O. P. A. a copy of the notice. Counsel for plaintiffs termination of the lease and that he must move within the landlord must state in the notice the reason for the he evicted save under certain circumstances, and that the regulations a tenant in possession paying rent could not was not a good notice; that according to said rules and rules and regulations of the O. P. A. the notice in question no objection was interposed to Mr. Garlick's making a client under the rules and regulations of the O. P. A. as

against Samuel Garrick isn't necessary," was not justified by the evidence nor the law.

After a careful study of the record we are satisfied that the judgment of the Municipal Court of Chicago is a just one and should be affirmed.

Since the appeal was perfected in this court a motion was filed on behalf of defendant David Garrick to dismiss the appeal as to him on the ground that he moved from the apartment about March 1, 1945. In support of the motion there was presented an affidavit of Captain Samuel Garrick, which reads as follows:

"Captain Samuel Garrick, being first duly sworn on oath deposes and says, that he is in the armed forces of the Army of the United States, attached to the medical corps, and at present resides at 206 S. Hamlin Avenue, Chicago, Illinois, in the apartment which the plaintiffs-Appellants seek possession.

"That he is the lessee of said apartment, and took possession thereof in October, 1941, and since that time said premises have contained his household effects and furniture; that at the same time his father, Rubin Garrick and his brother, David Garrick went into possession with him.

"That the rent for the apartment has been paid or tendered each and every month since the occupancy by this affiant.

"That within months after entering into this lease, this affiant was called to serve with the armed forces of the United States and while on furloughs or stationed in and around Chicago resided in said premises with his father and brother; that no other lease was entered into

against Samuel Garlick isn't necessary," was not justified by the evidence nor the law.

After a careful study of the record we are satisfied that the judgment of the Municipal Court of Chicago is a just one and should be affirmed.

Since the appeal was perfected in this court a motion was filed on behalf of defendant David Garlick to dismiss the appeal as to him on the ground that he moved from the apartment about March 1, 1945. In support of the motion there was presented an affidavit of Captain Samuel Garlick, which reads as follows:

"Captain Samuel Garlick, being first duly sworn on oath deposes and says, that he is in the armed forces of the Army of the United States, attached to the medical corps, and at present resides at 206 S. Franklin Avenue, Chicago, Illinois, in the apartment which the plaintiffs-appellants seek possession.

"That he is the lessee of said apartment, and took possession thereof in October, 1941, and since that time said premises have contained his household effects and furniture; that at the same time his father, Samuel Garlick and his brother, David Garlick went into possession with him.

"That the rent for the apartment has been paid or tendered each and every month since the occupancy by this affiant.

"That within months after entering into this lease, this affiant was called to serve with the armed forces of the United States and while on furloughs or stationed in and around Chicago resided in said premises with his father and brother; that no other lease was entered into

between him and the lessor and his tenancy thereby became year to year tenancy with no existing lease but the terms of the original lease nonetheless prevailing.

"That on or about the 5th day of October, A. D., 1942 this affiant was sent out of the territorial limits of the United States and participated in the North African campaign and later in the Sicilian and Italian campaigns and was hospitalized in a Hospital in Rome Italy for many months and returned to the United States in October, 1944 and though he has spent some time in the Vaughn General Hospital, and Percy Jones Hospital he has resided during furloughs and leaves in the rented premises at 206 S. Hamlin Avenue.

"This affiant further states that David Garrick one of the defendants moved from the premises on or about the 1st day of March, A. D., 1945, and in the premises reside this affiant and his father, Rubin Garrick, defendant.

"This affidavit is therefore made to induce the Court to dismiss the cause as to David Garrick, the question having become moot.

"Further this affiant sayeth not.

[Signed] "Captain Samuel Garrick
"Captain Samuel Garrick"

Plaintiffs filed objections to the motion; they also moved to strike the affidavit signed by Captain Garrick upon the ground that the motion and affidavit is an attempt to supply evidence on behalf of defendants which might have been submitted to the trial court. The affidavit of Captain Garrick seeks to bring to our attention certain alleged facts not shown by the transcript of the evidence, but we have no right to receive or consider additional evidence in passing upon this appeal. (See People ex rel. Rusch v. Ferro, 313

between him and the lessor and his tenancy thereby became year to year tenancy with no existing lease but the terms of the original lease nevertheless prevailing.

"That on or about the 15th day of October, 1944,

1944 this affiant was sent out of the continental United States and hospitalized in the North Atlantic campaign and later in the Italian and Italian campaigns and was hospitalized in a hospital in Rome Italy for many months and returned to the United States in October, 1944 and though he has spent some time in the Western General Hospital, and Percy Jones Hospital he has resided during throughout and leaves in the rented premises at 100 E. Main Avenue.

"This affiant further states that David Garrick one

of the defendants moved from the premises on or about the last day of March, A. D., 1945, and in the premises reside this affiant and his father, Edwin Garrick, defendant. "This affidavit is therefore made to induce the Court to dismiss the cause as to David Garrick, the defendant having become moot.

"Further this affiant says that not.

[Signed] "Captain Samuel Garrick"
"Captain Samuel Garrick"

Plaintiffs filed objections to the motion; they also moved to strike the affidavit signed by Captain Garrick upon the ground that the motion and affidavit is an attempt to supply evidence on behalf of defendants which might have been submitted to the trial court. The affidavit of Captain Garrick seeks to bring to our attention certain alleged facts not shown by the transcript of the evidence, but we have no right to receive or consider additional evidence in passing upon this appeal. (See People ex rel. Rusch v. Petro, 313

Ill. App. 202, 229.) The motion to strike the affidavit is sustained, and the motion to dismiss the appeal as to David Garrick is denied. We feel impelled to state, however, that the affidavit, as well as the record in this case, tends to show the wisdom and necessity of the Soldiers' and Sailors' Civil Relief Act of 1940. (See Hellberg v. Warner, 319 Ill. App. 117.) The instant record shows clearly that plaintiffs sought to gain an unfair advantage over Captain Garrick by omitting him as a defendant in the cause. There are circumstances in the case that justify the assumption that plaintiffs were mere dummies for Mrs. Clark. That counsel for plaintiffs should see fit to contend and argue that it was unnecessary to make Captain Garrick a defendant because he abandoned the apartment when he was inducted into the armed forces and went overseas, his wife remaining in the apartment and paying the rent, shocks one's sense of justice.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

43290

SOL GANELLIN,
Appellee,

v.

HARRY GINSBERG and ANNA GINSBERG,
his wife, co-partners trading as
Fidelity Laundry Service,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

32613-262

PRESIDING
MR./JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff conducted a hand laundry under the name Uptown Hand Laundry, defendants a steam laundry under the name Fidelity Laundry Service. Both were located in Chicago and about four blocks distant from each other. The business of plaintiff was to collect and receive from individual customers laundry which he in turn delivered to the truck driver agent of defendants, who called for, received and carried it to defendants' steam plant, where it was washed and afterwards returned to plaintiff, who ironed such articles as shirts and wearing apparel and redelivered same to the owners. Plaintiff began this business in April, 1940, and established his relationship with defendants about that time. With two interruptions it continued until October 26, 1942.

Plaintiff began this action at law against defendants October 30, 1942. He filed a complaint of twelve paragraphs, which in substance alleged that while this relationship between plaintiff and defendants existed, defendants by repeated wilful, intentional and malicious disregard of their contractual obligations ruined the business of plaintiff. The action was in tort.

Defendant answered, denying any disregard of contractual obligations and any wilful, intentional or malicious actions with design to hurt the plaintiff.

2.

The cause was put at issue and tried by a jury. At the close of all the evidence defendants moved for an instructed verdict in their favor, which was denied. The jury returned a verdict for plaintiff with damages assessed at \$6,065.00 and with a special finding of wilful malice. Defendants moved for judgment in their favor notwithstanding and for a new trial. Plaintiff remitted \$1,000.00. The motions were denied and judgment entered in favor of plaintiff against defendants for \$5,065.00, from which judgment defendants appeal.

Defendants contend the motion at the close of all the evidence to instruct a verdict for defendants should have been given, and that after the verdict motions for judgment for defendants notwithstanding or for a new trial should have been granted.

The action is of an unusual but widening class, wherein a plaintiff sues in tort, alleging violation by a defendant of contractual duties under circumstances creating a tort.

The ill feeling between the parties concerned a bundle of laundry owned by a customer of plaintiff named Appell, which had been delivered to plaintiff and through him to defendants but, it was claimed, not returned. The estimated value of this bundle was \$65.00 and it weighed about fifteen pounds. Search had been made at the Fidelity plant, not wholly successful. On October 28, 1942, plaintiff went to see Mr. Ginsberg at about 4:30 P. M. and asked him why the wash had not been returned on schedule. He says that Ginsberg became angry; asked him why he had sent ^{him} a lawyer's letter and said he refused to pay the demand. Plaintiff says he explained that he did not send to defendants any lawyer's letter; that Mr. Appell, the customer, had done this, and that Mr. Appell also caused a similar letter to be sent to him. At any rate, Ginsberg told him he refused to pay damages; that he wished plaintiff to assume responsibility

3.

of all losses; that he wanted him to put up \$100.00 security and \$50.00 as advance payment for the wash of next week.

Plaintiff says: "I told him that I hadn't got the money, and this is not the custom and practice --- * * * --- of the laundry business. * * * We didn't do it before, and we are not going to do it now. He told me that 'you know you can't go to wash anywhere else, you will have to stay here, and therefore, you will have to give me your order.' I told him that this is not going to be done. If he insists upon he will put me out of business. I will be forced to close because I have no money to give him, and I have no other place for it to go to. He said he don't care. This is the ruling, this is the way he wanted it to be done. That was about the substance of the conversation. I have given it all to you."

Plaintiff says there was a custom or practice in the City of Chicago at that time of tying the hand laundries to the steam laundries. He says: "No laundry man could go away from one wholesale steam plant to another." He further testified that when he had this conversation with Gansberg, Gansberg held twenty-six of his customers' bundles, "all the wash I sent out from Tuesday to Friday." He says that after ^{that} Thursday he did not get these bundles of laundry; that instead of bringing the laundry on Saturday, as usual, the driver came empty; that on Saturday he had a very bad day, the customers all came and demanded their laundry, and he had no excuse to give them; that on Saturday afternoon he tried to contact other steam plants; that he called four different laundries, which refused to pick up his laundry; that he could not pick up new wash because he had no place to send it; that he didn't call Gansberg on Monday. The driver came on that day to pick up wash but still did not bring the previous wash. About 4:30 the driver called up and asked him if he had the money to pay for the bundles and if he did he would

3.

of all losses; that he wanted him to put up \$100.00 security
and \$50.00 as advance payment for the job of next week.
Plaintiff says: "I told him that I hadn't got the money, and
this is not the custom and practice --- of the laundry
business. * * * He didn't do it before, and he was not going to
do it now. He told me that 'you know you can't go to
anywhere else, you will have to stay here, and therefore, you
will have to give me your order.' I told him that this is not
going to be done. If he insists upon having it out of
business, I will be forced to close because I have no money
to give him, and I have no other place for it to go to. He said
he don't care. This is the ruling, this is the way he wanted it
to be done. That was about the substance of the conversation. I
have given it all to you."
Plaintiff says there was a custom or practice in the city
of Chicago at that time of giving the bundle of laundry to the
steam laundry. He says: "The laundry man could go away
from one wholesale steam plant to another. The further distance
that when he had this conversation with Gansberg, Gansberg had
twenty-six of his customers' bundles, "all the rest I sent out
from Tuesday to Friday." He says that about Thursday he did not
get these bundles of laundry; that instead of bringing the
laundry on Saturday, as usual, the driver came a day; that on
Saturday he had a very bad day, the customers all came and demanded
their laundry, and he had no excuse to give them; that on Saturday
afternoon he tried to contact other steam plants; that he called
four different laundries, which refused to pick up his laundry;
that he could not pick up new work because he had no place
to send it; that he didn't call Gansberg on Monday. The driver
came on that day to pick up wash but still did not bring the
previous wash. About 4:30 the driver called up and asked him if
he had the money to pay for the bundles and if he did he would

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bring over the laundry in the evening. On Saturday he asked his attorney for advice, and the attorney called Ginsberg. On Monday, about 5:00 o'clock, the driver with the foreman brought him all the laundry for the whole week and presented him a bill for two weeks. He told them the check for the previous week was still on the spindle; that they could take that and for the next week he would check up and see if it was all right; that they would find a check a day or two later, and he paid the balance of the bill later. He says: "After that I did not stay any more in business."

This is in substance plaintiff's own story. It falls short of proof from which design to put plaintiff out of business can be inferred. In the first place, the whole evidence shows there could be no motive for this on the part of defendants. Their business with plaintiff had been profitable, apparently, to both of them. The driver did not refuse to call for plaintiff's laundry for the week ending Saturday, October 24, 1942. Plaintiff's "wet wash" was delivered on scheduled time. Plaintiff so testified. True, there were twenty-six bundles of "flat work" laundry which, by the schedule, should have been delivered to plaintiff on Saturday, October 24, 1942. These were not delivered until Monday, October 26, 1942, one business day late. "Lucky", most of us would say in these times.

Plaintiff relies on Doremus v. Hennessy, 176 Ill. 608, and Carlson v. Carpenter Contractors' Ass'n., 306 Ill. 331, cases clearly distinguishable in that the malevolent motives were in those cases quite apparent and the action based on an alleged conspiracy. See also Judevine v. Benzie-Montanye Fuel and Warehouse Co., 222 Wis. 512, 269 N. W. 295. The distinction is pointed out in Osgoodby v. Talmadge, 45 Fed. (2d) 696.

We hold the instruction requested in favor of defendants at the close of all the evidence should have been given and the

bring over the laundry in the evening. On Saturday he asked his attorney for advice, and the attorney called Ginzburg. On Monday, about 5:00 o'clock, the driver with the laundry brought him all the laundry for the whole week and presented him a bill for two weeks. He told them the check for the previous week was still on the spindle; that they could take that and for the next week he would check up and see if it was all right; that they would find a check a day or two later, and he paid the balance of the bill later. He says: "After that I did not hear any more in business."

This is an important witness's story. It falls short of proof from a telephone to one plaintiff out of business can be inferred. In the first place, the whole evidence shows there could be no motive for him on the part of defendant. Their business with plaintiff had been profitable, a generally to both of them. The driver did not refuse to call for plaintiff's laundry for the week ending Saturday, October 24, 1942. Plaintiff's "wet suit" was delivered on scheduled time. Plaintiff left as testified. True, there were two suit bundles or "flat work" laundry which, by the schedule, should have been delivered to plaintiff on Saturday, October 24, 1942. There were not delivered until Monday, October 25, 1942, one business day late. "Lucky", most of us would say in these times.

Plaintiff relies on Domena v. Hennessy, 175 Ill. 608, and Garson v. Carpenter Contractors' Ass'n, 308 Ill. 301, cases clearly distinguishable in that the defendant motives were in those cases quite apparent and the action based on an alleged conspiracy. See also Judith v. Hecker-Holtzky Fuel and Ware House Co., 282 Ill. 512, 208 N. E. 205. The distinction is pointed out in Garson v. Talmadge, 45 Fed. (2d) 696. We hold the instruction requested in favor of defendants at the close of all the evidence should have been given and the

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motion for judgment notwithstanding the verdict, after the return of it, should have been allowed. For these errors the judgment will be reversed.

REVERSED.

Niemeyer, . J., and O'Connor, J., concur.

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Journal of Management Education 30(6)

[illegible]

JOHN A. SCHILLO, as Administrator of
the Estate of John A. Schillo, Deceased,

Appellant,

V.

CITY OF CHICAGO,

Appellee.

Appeal from

Superior Court,

Cook County.

PRESIDING

MR./ JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action under the statute by the administrator for the benefit of the next of kin for alleged negligence causing the death of deceased, on trial by jury there was a verdict for defendant. Motions by plaintiff for a new trial and for judgment notwithstanding were overruled and judgment entered on the verdict, from which plaintiff appeals.

It is urged for reversal the verdict is against the manifest weight of the evidence; that the court erred in its rulings in admitting evidence offered by defendant, and that erroneous instructions were given to the jury at defendant's request.

The accident on which the action is based occurred about 4:30 A.M., March 1, 1942, on Chicago Avenue in the City of Chicago. It is an east and west street, near to and east of Halsted Street, which extends north and south. At the point where the accident occurred the avenue passes over the tracks of the Chicago and North Western Railroad at a level of about 17 feet above the ground. The railroad was then operated by Charles M. Thomson, Trustee. He was made defendant but dismissed out of the action on motion of plaintiff.

In the center of the avenue, about 2 feet 4 inches high and 1 foot wide, was a steel girder or abutment, as it is sometimes called. It is the theory of the plaintiff that on the morning in question, while yet dark, the intestate, driving his automobile in

[illegible]

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1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

117.

a westernly direction in the exercise of due care, collided with this girder or abutment and died as a result of the injuries received. It is argued the defendant City was negligent in constructing, maintaining and, in particular, in failing to guard the girder, or to place signs or lights to warn of its presence, and because of this negligence is liable. The complaint so alleged.

The answer of the City denied any negligence in respects alleged, and it is vigorously argued plaintiff wholly failed to show the deceased at the time he was injured was in the exercise of due care for his own safety.

A plat of the viaduct over which the street ran and a series of photographs are in evidence, showing the condition of the street and the viaduct at the time of the accident. The distance from the east end of the girder to the west end of it is 580 feet.

The deceased was driving his automobile west on this street, approaching the viaduct. The girder was a part of the viaduct and supported the surface of the street. Approaching the girder or abutment from the east was like driving up hill. Chicago Avenue at this point from curb to curb is 42 feet wide. From the edge of the girder to the curb is 20 feet 6 inches. On each side of the girder was a wooden guard about 6 by 6 inches. The girder was of a dark muddy color. There were no electric signs or lights of any kind on the east end of the girder, nor sign warning of danger. Trains passed under the viaduct, from which smoke was often emitted, rising to the street above. The nearest street light to the girder was 16 feet east from the east end of it set on a pole. Measured diagonally the light was 26 feet from the east end of the abutment. The street lights were 6,000 lumens or 478 candle power. The lamps were on the top of poles 22 feet high. The lights were in frosted globes under an enamel white surface shade, approximately 2 feet in diameter. There was no globe to the lamp, just a frosted bulb. There were other lights of similar kind

...direction in the ... of the ...
...his finger or ... died ...
...It is ... the ...
...main ...
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...of the ...
...series of ...
...the street ...
...distance from the ...
...550 feet.
...The ...
...street, ...
...visages and ...
...finger or ...
...Avenue at this point ...
...edge of the ...
...of the ...
...was of a dark ...
...of any kind on the ...
...danger. ...
...often ...
...light to the ...
...on a pole. ...
...east end of the ...
...478 candle power. ...
...The lights were in ...
...shade, approximately 2 feet in diameter. ...
...lamp, just a frosted bulb. There were other lights of similar kind

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and like power along the street on similar poles.

The steel girder stood in the center of the street. There were street car tracks on each side over which cars ran east and west.

The deceased left his home in his father's Plymouth automobile, in good health, mentally and physically. He was twenty-five years of age, lived with his parents and managed a manufacturing business for his father. He had a grammar and high school education with further technical training at night schools. The father estimates the worth of his services at \$5,000.00 per year. The deceased left home on the Saturday evening before the accident to meet a young lady friend. He was alone when the accident occurred on early Sunday morning. Just ahead of him was another automobile, driven by Sam Polokoff and occupied by the driver and three other young folks returning from a sorority party on the South Side of Chicago.

Polokoff estimates the speed at which the deceased was driving at from 25 to 40 miles an hour. He says Schillo honked his horn, indicating he wished to pass. Polokoff says he heard Schillo "gunning" his motor, meaning that he was adding more gas to his accelerator. Polokoff turned to the right, moving over to the north side of the street. Schillo passed him and Polokoff heard a crash. Schillo's automobile hit the abutment squarely and moved a distance on top of it estimated by the witnesses at from 20 to 30 feet. It was wrecked. The deceased was covered with blood. Police assistance was called and arrived in a few minutes. Deceased was unconscious and taken to the County Hospital, where he passed away the next day.

Defendant argues the decedent was guilty of contributory negligence, which precludes recovery.

We have read the evidence. The case was well tried. We

cannot hold the verdict to be against the manifest weight of the evidence. As a matter of fact, there is little conflict in it on material points. The girder had been built and was in use for more than fifty years. The case was simple on the facts. The evidence shows without dispute that there was no special light on the east end of the abutment, no guard and no sign of warning. However, assuming the jury might properly have found that there ought to have been such special light or guard or warning, and assuming the city was negligent in these respects, nevertheless the jury could have reasonably found for defendant on the theory that the intestate was himself guilty of negligence which proximately contributed to his own injury.

The witness Scott was a locomotive engineer. From the position in which he was he saw both the automobiles as they approached the abutment. He testified that in his opinion both were moving at a speed of 50 miles an hour. His testimony is corroborated in so far as the deceased is concerned by the distance the Plymouth automobile moved after striking the abutment. Testimony as to physical facts of that kind might well be more persuasive with the jury than the mere opinion of a number of witnesses. We hold the questions of the negligence of defendant and the contributory negligence of the plaintiff were both clearly for the jury.

Much complaint is made of defendant's instruction No. 13. After stating the plaintiff is required by law to prove his case by a preponderance of the evidence, it adds:

"If the plaintiff in this suit has not so proven his case, or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendants, then, in either of these cases, the verdict should be not guilty."

The instruction was approved by the Supreme Court in Chicago Union Traction Co. v. Mee, 218 Ill. 9. In Nosko v. O'Donnell, 260 Ill. App. 544, this court held it reversible error

to refuse to give it. It is criticized as "highly argumentative and palpably so"; as directing a verdict of not guilty but not referring "to the specific charges of negligence made"; that "the jury could not know what was the plaintiff's case but were required to speculate or guess what it was." These are without merit.

Complaint is also made of defendant's instruction No. 15.

It is:

"The court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff was injured as the result of an accident which occurred without the negligence of either of the plaintiff or of the defendant, then you are instructed the plaintiff can not recover and you should find the defendant not guilty."

It was held erroneous to give this instruction for the plaintiff in Streeter v. Hunrichouse, 357 Ill. 234, where there was no evidence to support it. There a judgment for plaintiff was reversed for that reason. The situation is quite different here.

Instruction No. 16 is complained of. It concerns the question of due care. In particular, plaintiff says, it told the jury the care exercised "must be proportionate to the danger, if any, known to the plaintiff or ascertainable by the exercise of ordinary care and exercised with reference to the situation and position which such person is about to take or in which such person finds himself." This is said to be followed by No. 17, given at the request of plaintiff, which tells the jury that if both the decedent and defendant were guilty of negligence there could be no recovery. It is argued this instruction, thus given, put upon the decedent the duty to anticipate and look out for the negligence of the defendant in obstructing the street, and that if he did not do so, he likewise would be guilty of negligence and could not recover, while the failure to light or guard the girder with warning signals made it impossible for him to protect himself against defendant's negligence. As we read

the evidence of Polokoff and Scott, the record is not to this effect. On the contrary, this issue was for the jury as to whether plaintiff should have seen the girder before running into it. Moreover, we hold the rule laid down by the Supreme Court in C. B. & Q. R. R. Co. v. Warner, 108 Ill. 538, 554, is applicable here:

"Where the reviewing court can see the case has been fairly tried, and that the judgment is clearly right upon the facts, and that consequently another trial must necessarily result the same way, it will not reverse on the ground an erroneous instruction may have been given or a proper one has been refused."

This case in its facts was simple. It was not one in which a jury would be easily misled as to the issues, which were plain and clear.

Objection is made that a resolution of the City Council, relating to the construction of the viaduct in question, was admitted in evidence. There was no question on the trial that the abutment was constructed and maintained by the authority of the City. Even if there was technical error in admitting this evidence, it was harmless.

The judgment will be affirmed.

AFFIRMED..

Niemeyer, .J., and O'Connor, J., concur.

[illegible]

43341) Consolidated.
43346)

326 LA. 464

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

ERNEST JOHNSON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By leave of court Charles Bradbury filed a verified information charging that the defendant, Ernest Johnson, on the first of November, 1944, "did unlawfully, knowingly and wilfully encourage Gail Bradbury a female person under the age of 18 years to-wit: 8 years of age to be or to become a delinquent child and did then and there unlawfully, knowingly and wilfully do acts which directly produced, promoted and contributed to conditions which tended to render said Gail Bradbury to be or to become a delinquent child in that he, the said Ernest Johnson did commit an indecent act on the person of the said Gail Bradbury" in violation of section 2, par. 104, ch. 38, Ill. Rev. Stat. 1943.

The same charge was made by Helen C. Sanders, in an information filed against the defendant, Ernest Johnson, naming Jean Sanders, who was 8 years of age, in the identical language used against him in the information above mentioned.

The informations were filed November 6, 1944, and on that date the court entered an order reciting that Johnson had been arrested without warrant and was present in open court, etc. The order then recites that "Now come the people by the State's Attorney and the defendant as well in his own proper person as by counsel also comes" and the defendant being arraigned, entered a plea of

62-11388-100

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

THESE THINGS
WAS

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

also comes" and the defendant being arraigned, entered a plea of not guilty. The information was filed November 6, 1944, and on that date the court entered an order reciting that Johnson had been arrested without warrant and was present in open court, etc. The order then recites that "Now come the people by the state's attorney and the defendant as well in his own proper person as by counsel for the defendant, to wit: S. J. Johnson, to be or to become a delinquent child in violation of section 2, par. 104, ch. 26, Ill. Rev. Stat. 1943. An indictment was filed against the defendant, James Johnson, being then 16 years of age, in the judicial language used against him in the information above mentioned.

2.

not guilty. That the court duly advised him of his right to a trial by jury and that he elected to waive a jury trial and by agreement the matter was submitted to the court for trial without a jury. And after hearing the testimony of the witnesses and argument of counsel, the court found defendant guilty as charged in the information and that he was guilty of the criminal offense of contributing to the delinquency of the child, and it was adjudged that he be confined in the House of Correction for one year. This was the sentence imposed in each case and it was ordered that the sentences run concurrently.

Writs of error were sued out in each case and counsel for defendant says that "the Informations do not charge an offense under the Statute because of failure to allege specific acts," and a number of authorities are cited, discussed and applied. The evidence taken on the trial is not in the record. On the other side, the State's Attorney contends that similar informations based on the same statute have been held sufficient in this court, citing People v. Wallace, 185 Ill. App. 218, (Abst.); People v. Walker, 305 Ill. App. 500, (Abst.); People v. Billow, 307 Ill. App. 549, (Abst.), (affirmed in 377 Ill. 236) and other cases. Defendant was charged with violating Par. 104, §2, ch. 38, Ill. Rev. Stats, 1943, which provides that "Any person who shall knowingly or wilfully cause, aid or encourage *** any female under the age of eighteen (18) years to be or to become a delinquent child as defined in section one (1), or who shall knowingly or wilfully do acts which directly tend to render any such child so delinquent *** shall be deemed guilty of the crime of contributing to the delinquency of children ***." And Par. 103, §1 of the act provides in part that a delinquent child is any female who under the age of 18 years "is guilty of indecent or lascivious conduct." In each of the informations the two little girls involved were 8 years of age.

not guilty. That the court fully advised him of his right
to a trial by jury and that he elected to be tried by a jury and I
and by agreement the matter was submitted to a jury.
trial without a jury. and I was sitting at the head of the
witnesses and argument of counsel, the jury returned a verdict
as charged in the information and that the guilt of the
criminal offense of contributing to the delinquency of the child,
and it was returned that he was guilty of the same.
for one to be. The evidence taken on the trial is not in the record. In
was ordered that the case be remanded to the county jail.
trial of error was taken and the jury returned a verdict of
defendant says that "the information do not charge an offense
under the Statute because of the fact that the statute requires
and a number of authorities are cited, including the Illinois
The evidence taken on the trial is not in the record. In
other case, the State's Attorney called a witness who testified
tions based on the same statute. The State's Attorney called a witness
court, citing People v. Miller, 112 Ill. 2d 100, 101 (1901);
People v. Miller, 112 Ill. 2d 100, 101 (1901); People v. Miller,
112 Ill. 2d 100, 101 (1901); People v. Miller, 112 Ill. 2d 100,
112 Ill. 2d 100, 101 (1901); People v. Miller, 112 Ill. 2d 100,
112 Ill. 2d 100, 101 (1901). Defendant was charged with the same
Ill. Rev. Stat., 1905, which provided that "any person who
knowingly or willfully causes, aids or encourages any female
under the age of eighteen (18) years to be or to become a delin-
quent child as defined in section one (1), or who shall knowingly
or willfully do acts which directly tend to render any such child
so delinquent" shall be deemed guilty of the crime of contribut-
ing to the delinquency of children." and that, 1905, §1 of the
act provides in part that a delinquent child is any female who under
the age of 18 years "is guilty of indecent or lascivious conduct."
In each of the informations the two little girls involved were
8 years of age.

3.

In the Billow case (307 Ill. App. 549,) it was contended that the information was insufficient which charged that defendant "did then and there unlawfully, knowingly and willfully cause, aid and encourage Marvin Dupont Wilson" a male child under the age of 17 years "to be or to become a delinquent child, and did knowingly and willfully do acts which directly tended to render 'such a child a delinquent child,' in violation of par. 104, ch. 38 of the Illinois Statutes, 1937." The court held the objection untenable and said: "It is urged that the information fails to charge a crime because it fails to set out what particular acts, in any, defendant committed. People v. Ellis, 185 Ill. App. 417, and similar cases are relied on. The information here was in the language of the statute, and this was held to be sufficient in People v. Wallace, 185 Ill. App. 214. A similar ruling was made by this court in People v. Walker, (Opinion abstracted) 305 Ill. App. 500."

In the instant cases no motion was made to quash the informations nor was a bill of particulars asked and we think it obvious that the defendant clearly understood the charges made against him. The informations charged that defendant committed an indecent act on the persons of the two 8 year old girls. And as said in People v. Friedrich, 385 Ill. 175-179: "The words 'obscene' and 'indecent' are words of common usage and are ordinarily used in the sense of meaning something offensive to the chastity of mind, delicacy and purity of thought, something suggestive of lustfulness, lasciviousness and sensuality. It is a well-established rule that in the application of a statute, the words are to be given their generally-accepted meaning, unless there is something in the act which indicates that the legislature used them in a different sense ***."

that the information was investigated which showed that defendant "did then and there unlawfully, knowingly and willfully

... to reliability of ...

[illegible]

(S) [REDACTED] v. [REDACTED], [REDACTED] [REDACTED]

(Continued on page 2)

PLEASE PRINT NAME AND ADDRESS OF PERSON TO WHOM YOU WANT TO DONATE:

Do not use any of your information on the other person's property to show you

...to the ... of the ...

... ..

1. The above information was obtained from the following sources:

4.

In these circumstances we think the contention of the defendant cannot be sustained. The judgment of the Municipal court in each case is affirmed.

JUDGMENTS AFFIRMED.

Niemeyer, F.J., and Matchett, P. J., concur.

In these circumstances we think the conviction of the
defendant cannot be sustained. The judgment of the Municipal
Court in each case is affirmed.

ORDER OF THE COURT

Wise, J., and Macpherson, J., concur.

43356

JANE HIRSCH,

v.

LEO PAUL HIRSCH.

LEO PAUL HIRSCH,
Appellant.

v.

PHILEPPA WEINSTEIN,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

March 23, 1943, Jane Hirsch filed her complaint for divorce against Leo Paul Hirsch alleging that they were married in Chicago April 29, 1941, and lived together until February 27, 1943; that Thomas Stevens Hirsch was born to them August 24, 1942. Defendant was charged with cruelty. Plaintiff prayed that she be given the custody of the child. Defendant filed an answer denying the charges made against him and March 26, a stipulation was filed that the cause might be heard as a default matter. On the same day an order was entered setting the case for hearing on March 31. April 9, a decree was entered granting plaintiff a divorce and the care, custody and control of the child; defendant was given leave to visit the child at reasonable times; alimony was waived and the question of the support of the child was reserved for further consideration.

October 11, 1943, defendant filed his verified petition in which he set up the entry of the decree of divorce; that at the time, the minor child of the parties was 7 months old; that defendant was given the right to visit the child; that since the decree was entered plaintiff had remarried and was living at

JANE HIRSCH,

v.

LEO PAUL HIRSCH.

LEO PAUL HIRSCH,

Appellant.

v.

PHILIP A. WEINSTEIN,

Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

March 23, 1943, Jane Hirsch filed her complaint for divorce against Leo Paul Hirsch alleging that they were married in Chicago April 29, 1941, and lived together until February 27, 1943; that Thomas Stevens Hirsch was born to them August 24, 1942. Defendant was charged with cruelty. Plaintiff prayed that she be given the custody of the child. Defendant filed an answer denying the charges made against him and March 26, a stipulation was filed that the cause might be heard as a default matter. On the same day an order was entered setting the case for hearing on March 31. April 2, a decree was entered granting plaintiff a divorce and the care, custody and control of the child; defendant was given leave to visit the child at reasonable times; alimony was waived and the question of the support of the child was reserved for further consideration. October 11, 1943, defendant filed his verified petition in which he set up the entry of the decree of divorce; that at the time, the minor child of the parties was 7 months old; that defendant was given the right to visit the child; that since the decree was entered plaintiff had remarried and was living at

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Biloxi, Mississippi; that plaintiff's mother, Mrs. Weinstein, had assumed control of the child and refused to allow defendant to take him to his own home several times during the week. That the child's grandmother told petitioner that plaintiff, the mother of the child, had told the grandmother she could have control of the child. Petitioner further averred that being the father of the child he "has a prior claim" to the child but was willing to allow the grandmother to retain its custody providing petitioner was given the right to take the child twice a week, etc. On the same day the court entered an order giving defendant leave to take the minor child for certain hours on Saturdays and Sundays. Apparently there was no objection to this order.

September 21, 1944, the affidavit of Jane Bier, formerly Jane Hirsch, was filed by defendant, in which she referred to the decree of divorce; that the custody of the child, who was then 2 years old, had been awarded to her; that plaintiff had remarried and had allowed the minor child to remain with plaintiff's mother, Mrs. Weinstein, and plaintiff asked that the decree be modified to grant the custody of the child to his father, with the right of plaintiff to visit the child at reasonable times.

On the same day, defendant filed his petition setting up the decree of divorce, etc., the remarriage of the child's mother; that the child was placed in the home of the grandmother, Mrs. Weinstein; and alleging that defendant had received many letters from the plaintiff that she would like to have the decree modified and had forwarded to him the affidavit above mentioned. On the same day an order was entered granting Mrs. Weinstein leave to file an answer to the petition. October 3, 1944, she filed her answer in which she set up that she was the

Blitz, Plaintiff; that Plaintiff's mother, Mrs. Weinstein, had assumed control of the child and refused to allow defendant to take him to his own home several times during the year. That the child's grandmother, Mrs. Weinstein, had the mother of the child, had the grandmother a co-guardian control of the child. Plaintiff further averred that during the father of the child he "has a right to visit the child and is willing to allow the grandmother to retain the custody, providing petitioner was given the right to take the child to his home, etc. On the same day the court entered an order giving defendant leave to take the minor child to his home or grandparents and Sundays. Apparently there was no objection to this order. September 21, 1944, the affidavit of Jane Risch, formerly Jane Risch, was filed by defendant, in which was referred to the decree of divorce; that the custody of the child, who was then 2 years old, had been awarded to her; that Plaintiff had remarried and had allowed the minor child to remain with Plaintiff's mother, Mrs. Weinstein, and Plaintiff as of that time the decree be modified to grant the custody of the child to his father, with the right of Plaintiff to visit the child a reasonable times. On the same day, defendant filed his petition setting up the decree of divorce, etc., the remarriage of the child's mother; that the child was placed in the home of the grandmother, Mrs. Weinstein; and alleging that defendant had received many letters from the Plaintiff that she would like to have the decree modified and had forwarded to him the affidavit above mentioned. On the same day an order was entered granting Plaintiff leave to file an answer to the petition. October 6, 1944, she filed her answer in which she set up that she was the

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mother of plaintiff and the grandmother of the minor child who was then a little over 2 years of age; that since the marriage of plaintiff and defendant in 1941, she had contributed \$100 per month to the support of the couple and continued to do so until February 27, 1943, when defendant abandoned plaintiff. That the child was born August 24, 1942; that the father and mother were unable to pay the necessary medical and hospital expenses and that she was obliged to do so. Since the birth of the child she had employed a nurse to take care of him at \$25 per week; that when he was about 3 months old defendant informed her he was going to go into the Army and gave up the apartment occupied by him and plaintiff and that thereupon she moved into a larger apartment in order to accommodate plaintiff, defendant and the child, where they lived until February 27, 1943; that defendant agreed to pay \$17.50 towards the support of the child but had wholly failed to do so. That in the decree of divorce the question of support of the child was reserved because the respondent has at all times supported the child. That during all the time the only contributions made by defendant towards the support of the child were a few minor articles of clothing. That on June 1, 1943, "plaintiff remarried for the third time and moved to Mississippi, abandoning the minor child to the care and custody of this respondent," and since the remarriage, plaintiff had visited the child only about 3 times and never made any contribution towards the child's support. The answer further set up that about October 11, 1943, defendant filed his petition, as above stated, for the purpose of visiting the child (and made no objection to respondent's custody, care and maintenance of the child) which request of defendant was granted by the respondent. That defendant failed to visit the child except on a few occasions at such times as were detrimental to its welfare, etc. That plaintiff and defendant had

mother of plaintiff and the grandmother of the child, who was then a little over 3 years of age; that after the marriage of plaintiff and defendant in 1941, the defendant contributed \$1.00 per month to the support of the child and continued to do so until February 27, 1943, when defendant's income was plaintiff. That the child was born August 4, 1937; that the father and mother were unable to pay the necessary expenses of hospital expenses and that the child was born at the birth of the child she had employed a nurse to take care of him at \$25 per week; that when he was about 3 months old defendant informed her he was going to go into the city and leave up the apartment occupied by him and plaintiff and that defendant moved into a larger apartment in New York City; that defendant and the child, where they lived from May 27, 1943; that defendant agreed to pay \$1.00 per month of the child but had wholly failed to do so; that in the event of divorce the question of custody of the child was based on because the respondent had at all times neglected the child; during all the time the only contributions made by defendant towards the support of the child were a few minor expenses; that on June 1, 1943, plaintiff removed the child to third time and moved to New York City, abandoning the child to the care and custody of this respondent; and since that time, plaintiff has visited the child only about 4 times and never made any contribution towards the child's support. The answer further set up that about October 11, 1943, defendant filed his petition, as above stated, for the purpose of visiting the child (and made no objection to respondent's custody, care and maintenance of the child) which request of defendant was granted by the respondent. That defendant failed to visit the child except on a few occasions at such times as were of no mental to its welfare, etc. That plaintiff and defendant had

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abandoned the child since April 9, 1943, and that respondent had the care and support of the child since he was 3 months old; that it was not for the best interest of the child to give the custody of him to the father.

On the same day, October 3, the matter was heard before Judge Feinberg, and an order entered which recites the filing of the petition, the answer, etc.; that the court had heard the evidence and arguments of counsel for the respective parties and it was ordered, adjudged and decreed that the prayer of defendant's petition be denied; and that the minor child remain with his grandmother, Mrs. Weinstein, "until the further order of this court." It is from this order that defendant appeals.

The chancellor in deciding the case said that in such cases the welfare of the child was of primary and paramount importance and of course the rights of the parents and others persons should be considered. Obviously this is the law, People v. Porter, 23 Ill. App. 196; Cormack v. Marshall, 211 Ill. 519, and the court said: "It appears here clearly that this child has been with the maternal grandmother since birth, with the exception of a short period of time when the parties had their own apartment. The maternal grandmother is a widow. She has a large apartment, and apparently is a woman of means. She has had this child since birth, and had given it, concededly every care and comfort and protection that a child of these tender years would require. There is no complaint raised at all by any one here against the manner in which the child has been cared for. ***

"Nothing has been done here to disturb the custody of this child from the date of the decree was entered until the present, except in October of 1943 the Court, after a hearing, fixed specifically the hours and the days when this father could have

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the child, which is proper and leads to less confusion. He has not been denied that right. He does not complain that he has not had the benefit of that order." And the uncontradicted evidence is that he had the benefit of other visits with the child.

"Now, let us be sensible about this thing. Here is a young man who contemplates remarriage. He doesn't have any idea, and couldn't have any idea how well that marriage will result. He has made one mistake apparently, I hope he makes no more. But should he find he has made some mistake in remarriage, you would have a child in the hands of a young woman who had not even had an opportunity to adjust her life with her husband, much less to ask her to adjust her life with a young infant of that age.**

"It is not fair to burden a young girl twenty-one or twenty-two years of age with a young infant of that age. It would be better for the sake of every one, and for the sake of that child, to see what kind of a home life he has after he is married. *** we shouldn't deprive that child of what he has, we shouldn't take it away from the child to satisfy the wishes of either a roaming mother or an ambitious father. ***

"The defendant is living with his mother and father. I don't know if his mother wants to have the child in her home. She has not been brought in here for the Court to see or hear her. I don't know whether his mother wants to raise this child, I would have to know from her whether she wants the child in her home. This court was not afforded an opportunity to see the paternal grandmother and paternal grandfather. They are not in here clamoring for that child. And that is where he is going to take the child. Is it fair to force the care of the child on this paternal grandmother and paternal grandfather, at their age, without their being here at least to clearly indicate their urge and desire to have the child? *** He has no other place to offer

5.

the child, which is on record as being established, is that
not been denied that right. It was not on the 1st of June
not had the benefit of that order." and "The defendant
denies in fact he had the benefit of that order. The child

"Now, let us see what the evidence is. The child
young man who continued to live with the defendant, and
and couldn't have any other home. The child was not
He has been one of the best of boys. He has been a
should be that he has been a good boy. He has been
have a child in the family. The child was not
had an opportunity to live with the defendant, and

is to see how to adjust him. The child was not
"It is not fair to burden a young man with a
years of age with a young child of that age. It is not
for the sake of every one, but for the sake of the child,
are what kind of a life is that? The child is not
efforts to give the child a home. The child is not
it away from the child to give the child a home. The child
mother on an expedition and not a home.

"The defendant is living with the child and the child
knows it. The mother wants to have the child. The child
not been brought in here for the child. The child
don't know whether his mother wants to have the child. The child
have to know from his mother. The child is not a home.
This court was not satisfied as to the defendant's
grandmother and paternal grandfather. They are not in
clearing for that child. And that is there no in being to take
the child. Is it fair to force the care of a child on this
paternal grandmother and paternal grandfather, at their age,
without their being here at least to clearly indicate their age
and desire to have the child?" He has no other place to offer

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that child. It is the child's welfare this Court is interested in and not the father's or the mother's.

"If and when he marries again, and he has established a home, and he can convince this Court he has a home where that child can be cared for, this Court is always open. He is never foreclosed. He may not have succeeded now, he may succeed the next time. But this Court would be derelict in its duty if it disturbed the present custody of that child under these circumstances."

We have considered all the evidence in the case and arguments of counsel^{and} are clearly of opinion that the finding of the chancellor ought not to be disturbed. The order appealed from is not final as to the custody of the child for it is there expressly decreed that the child remain with his grandmother "until the further order of this court."

The order of the Circuit court of Cook county is affirmed.

ORDER AFFIRMED.

Niemeyer, J., and Matchett, J., concur.

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in and not the father's or the mother's.
"It and when he married again, he was not allowed to
come, and he can convince this Court he had a good reason why
child can be cared for, this Court is always right. He is never
frowned upon. No man not have exercised his right. I cannot
next time. But this Court would be satisfied in its duty if it
distributed the present custody of the child with some other
person."

"We have considered all the evidence in this case and
and
state of counsel and of course of opinion that the child is
the Chancellor ought not to be disturbed. It is not necessary
from it not final as to the child. It is not final as to the
expressly decided that the child shall stay with the mother.
"Until the further order of this court."

The order of the Circuit Court of Cook County is affirmed.

Almeida, J., and Litcher, J., concur.

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FEDERAL LIFE INSURANCE COMPANY,
a corporation,

Plaintiff (Appellant),

v.

FREDERICK L. HUNTER, JR.,

Defendant (Appellee)

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

326 I.A. 465

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to cancel an insurance policy on the grounds of misrepresentation and failure to fully disclose material facts in the application. After trial the complaint was dismissed for want of equity and plaintiff appeals.

In July of 1930, defendant, then 35 years of age, filed a written application for the policy which issued August 4, 1930, indemnifying him against losses from disability and hospitalization. In 1931 and 1939 defendant was hospitalized and was paid the indemnities. In 1940 after a four day hospitalization period, plaintiff refused to pay defendant's claim, tendered him the premiums paid plus interest and asked him to agree to the cancellation of the policy. He refused to do so and commenced suit in the Municipal Court. Prosecution of that suit is suspended, until this cause is determined, by agreement of the parties.

One issue here is whether defendant misrepresented the condition of his health and withheld medical information in the application material to the risk. The other, if plaintiff prevails in the first, is whether it is guilty of laches.

The application is in the record as part of the insurance policy. It consists of two parts. The answers in Part I were written by "Edw. A. Condy (Soliciting Agent)" and those in Part II were written by "A. J. Rissinger, Md., Medical Examiner." Both

FEDERAL LIFE INSURANCE COMPANY,
a corporation,

Plaintiff (Appellant),

v.

FREDERICK L. HUNTER, JR.,

Defendant (Appellee).

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MR. JUSTICE LEE

This is an action to compel an insurance policy on the grounds of misrepresentation and failure to fully disclose material facts in the application. After trial the court was divided for want of equity and plaintiff's appeal.

In July of 1930, defendant, then 33 years of age, filed a written application for the policy which issued August 4, 1930, indemnifying him against losses from disability and hospitalization. In 1931 and 1932 defendant was hospitalized and was paid the indemnities. In 1940 after a four day hospitalization period, plaintiff refused to pay defendant's claim, tendered him the premiums paid plus interest and asked him to agree to the cancellation of the policy. He refused to do so and commenced suit in the Municipal Court. Prosecution of that suit is suspended, until this case is determined, by agreement of the parties.

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The application is in the record as part of the insurance policy. It consists of two parts. The answers in Part I were written by "Edw. A. Condy (Soliciting Agent)" and those in Part II were written by "A. J. Hissinger, M.D., Medical Examiner." Both

parts were signed by defendant who certified he had "read the above statements and answers and find each of them recorded as made by me and that each of the answers made by me as stated in Parts I and II of this application are full, complete and true." In Part I he agreed th t any false answer made to either Condry or ~~Rissinger~~ with intent to deceive or materially affecting either acceptance of the risk or hazard assumed by plaintiff should bar his recovery. Plaintiff says defendant falsely answered in the negative question 16 of Part I, "Have you ever had or have you now any bodily or mental infirmity or deformity (including hernia and rupture) or have you impaired hearing, any disease of either eye, lost a limb or the sight of an eye, or are you in any respect maimed or in unsound condition mentally or physically? (Give particulars)." It also says that he failed to disclose material facts by stating in Part II that he had never had pneumonia, la grippe or any other form of lung disease or any disease of the stomach or bowels or any disease of the rectum or of the spine and, by stating that he never had rheumatism, lumbago or gout or any discharge from the ear.

Plaintiff introduced hospital records made in February, 1931 which stated that defendant had had periodic disabling attacks progressively frequent and severe, of low back pain for 6 or 8 years, and leg pains 5 months before the time of the report; that he had been habitually constipated and had severe typhoid 20 years earlier; and that he complained of pain in the leg and had pains in the hip and sciatica nerve and sacroiliac tenderness. The diagnosis was lumbar myositis, sciatica and chronic constipation. It also introduced the hospital record of July 15, 1940, stating that defendant had hip pains beginning about 1924 and in 1931 sciatic pain in the legs; that there was acute sciatic attacks in 1931 and 1939, probably caused by business worries; that since 1931 he had

parts were signed by defendant who testified as non-read the above statements and answers and find each of them correct as made by me and that each of the answers were by me as stated in Part I and II of this application and that, consequently, and true, I am agreed that any false answer made to either party or witnesses with intent to deceive or materially mislead the court or jury, is a risk or hazard assumed by plaintiff and the court, and the court will say defendant is guilty of this offense and that he is guilty of Part I, "Have you ever had or have you or any family member any infirmity or deformity (including hernia and rupture) or have you impaired hearing, any disease of either eye, loss of limb or the right of an eye, or are you in any way so disabled as to be unable to perform mentally or physically? (Give details)." I also say that he failed to disclose material facts by stating in Part I that he had never had pneumonia, in answer to any question of lung disease or any disease of the stomach or bowels or any disease of the chest or of the spine and, by stating that he never had rheumatism, lumbago or gout or any disease of the feet.

Plaintiff introduced hospital records made in January, 1931, which stated that defendant had had certain recurring attacks of leg pains 5 months before the time of the report; that he had been habitually constipated and had severe attacks 30 years earlier; and that he complained of pain in the leg and hip and pain in the hip and sciatic nerve and sacral nerve tenderness. The diagnosis was lumbago, myositis, sciatica and chronic constipation. It also introduced the hospital record of July 15, 1940, stating that defendant had hip pains beginning about 1934 and in 1931 sciatic pain in the leg; that there was acute sciatic attacks in 1931 and 1933, probably caused by business worries; that since 1931 he had

fatigued easily; that defendant's chief complaints were bowel trouble since he was 5 years old; arthritis-sciatica for 16 years and fatigue for 10 months; that in 1931 he had "cathartic colitis" for which the treatment prescribed produced excellent results until shortly before the date of the report; that he had influenza in 1919 and 1922 and typhoid when he was 13 years old; that he had^a/hemorrhoidectomy in 1930; that his brother and father had rheumatism and arthritis, his brother an arthritic spine and his sister arthritis; that he did not appear ill; and that he gave the impression of being a hypochondriac.

The medical men who made the records testified that the writings were their summaries and interpretations of what defendant told them. A physician who examined him in August, 1932 testified to making records which were introduced. They stated that defendant had had occasional hip and back pains for five years which became progressively worse; that he had difficulty in sitting and bending in August, 1930; that he had had influenza; that he had been chronically constipated, but was now all right; that he had arthritis and that he spent a month in St. Luke's Hospital in 1931 for sciatica, which left entirely. The record contained an entry made after the history was taken of the doctor's conclusion which was "sacro-lumbar arthritis."

A medical expert testified that x-rays taken in July, 1940 showed arthritic changes in the lower back, sacroiliac and hip regions; that the deposits were "old stuff - years rather than months"; that the deposits developed differently for different people; that the changes may have been there a long time before any acute manifestation and that from the x-rays he could not tell how long defendant's arthritic changes had been in process; that with hard structures of the back there might be change with no pain or disability; and that the tendency toward arthritis might be hereditary.

Dr. Thomas the attending physician in 1931 said he treated defendant for arthritis of the lower back and sciatica; that

defendant said the pain started about 1927; that the arthritis was not of recent origin; that the vertebral arthritis was a 15 year development; and that in 1939 defendant's arthritis was improved and the last time the witness saw him it had spent itself.

A medical referee testified that different answers to some of the questions would per se have materially affected the risk, while others would require further medical details. An insurance underwriter testified he would not approve an application with a statement that the applicant was in unsound physical condition or had disease of the stomach or bowels or the spine, or rheumatism, etc., or discharge from the ear. He said that underwriters do not consider medical examiners' reports. This seems inconsistent with the medical referee's testimony.

An employee of plaintiff testified that defendant said he had withheld certain information, but denied making certain misrepresentations.

It seems to us that when plaintiff prepared its application it should have known that persons applying for insurance would answer questions in the light favorable to their application. The question, "Are you * * * in unsound condition * * * physically?", calls for an applicant's opinion of his health. Either he can answer himself and, generally will do so in favor of himself, or he will not understand the question and ask for details. The details will be given by the soliciting agent whose function is to record the answers and sign Part I of the application. We may assume the agent is anxious to sell the policy.

Over objection of plaintiff, the court permitted defendant to testify to conversations, with "Soliciting Agent" Condy, when the application was made. Plaintiff insisted it was not bound by statements of Condy and that defendant was bound by his own answers. In

Defendant said the pain started about 1937; that the arthritis was

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rebuttal there was testimony that Condy was not employed by plaintiff but that its agent was the "Higbee Agency". It appears from the policy that it issued through the Higbee Agency and that Condy signed as soliciting agent. He delivered the benefit checks to defendant. It is a fair inference that Condy was the Higbee employee and plaintiff's sub-agent. We think the court properly admitted the testimony.

Defendant says he asked Condy what Question 16 meant and was told that if he considered himself in good health and had worked steadily, he could answer in the negative. He says he told Condy that he lost work but once, in 1922 with influenza, and told him of the typhoid.

Defendant worked from 1922 to 1930 from 8 to 20 hours a day in electric research, standing a great deal. It is true he had chronic constipation, but it had never brought him to a doctor. Following the advice received at St. Luke's Hospital it had been corrected. He admits having had "catches" in his hip occasionally but says he had none between 1926 and 1930 and none which interfered with his work. The x-rays in the case were taken 9 years after the application was filed and the doctors do not definitely say defendant's arthritic condition must have manifested itself before 1930. The medical records of 1931/^{state}~~indicate~~ that defendant was generally in good physical condition and the medical examiner testified that defendant was in sound health in July, 1930. We believe the trial court was justified in finding that as to this question there was no misrepresentation or withholding of information and was justified in finding that defendant's answer was not false.

It seems clear that the questions asked in Part II presupposed some discussion with the medical examiner. The average person could not for instance freely answer from his own knowledge whether he had

rebuttal there was testimony that Gandy was not employed by plaintiff but that its agent was the "Higbee Agency". It appears from the policy that it issued through the Higbee Agency and that Gandy signed as soliciting agent. He delivered the benefit checks to defendant. It is a fair inference that Gandy was the Higbee employee and plaintiff's sub-agent. We think the court properly admitted the testimony.

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It seems clear that the questions asked in Part II presupposed some discussion with the medical examiner. The average person could not for instance freely answer from his own knowledge whether he had

locomotor ataxia, vertigo or syncope, renal colic or jaundice, gallstones or any disease of the gall-bladder, liver or spleen. Plaintiff evidently foresaw, as it should have foreseen, that applicants, especially good risks, would need interpretations, explanations or advice in answering the questions, for it provided in the form a space for the medical examiner to sign as a witness. Defendant says he told the medical examiner, in answer to the question about disease of the stomach or bowels, of his constipation and typhoid; in answer to the question whether he had had pneumonia, la grippe or lung disease, told of the influenza; and in answer to the question whether he had had rheumatism, lumbago or gout, or disease of the spine, told of the "catches" in his hip. In answer to the question whether he had had a discharge from the ear, defendant says he told Rissinger that his parents informed him at 13 years of age that during an attack of typhoid there had been a discharge from his ear, and that he had never had a doctor's diagnosis. Rissinger said he considered defendant in good health when the application was signed; that he was told of defendant's "catches" in the back but had not put it down because defendant had not consulted a doctor and an examiner does not put down every ache or pain; that the influenza was put under fever and not under lung disease; and that as he recalled it, the defendant's statement of the ear discharge "did not amount to anything" and was possibly connected with the typhoid. He further testified that he did not recall defendant telling him of a 3 year ear discharge about 1915.

Clearly, in 1920 when defendant applied for a policy with another company, the term "otorrhea" must have been explained to him for he stated there was a 3 year discharge of the ear. It may be that ^{the} medical examiner of that company had a different view of the seriousness of an ear discharge. Defendant cannot be blamed for this diversity of view, if it is a fact. Moreover, the hospital records indicate normalcy of defendant's ears and defendant's medical experts

ing the normalcy of defendant's ears and defendant's medical experts given the view, it is a fact. Moreover, the hospital records conclusively of an ear discharge. Defendant cannot be blamed for this that medical examiner of the company had a different view of the the for he stated there was a 1 year discharge of the ear. It may be another company, the term "discharge" may have been explained to him. Clearly, in 1980 when defendant applied for a hearing with

testified that if defendant had no reoccurrence of the ear discharge between 1915 and 1930 apprehension of ill health from that source could reasonably be precluded. Dr. Rissinger's action is understandable.

While bowel trouble, as defendant's ailment was termed in the hospital reports, may be embraced in the term "disease", we think the ordinary person's estimate of disease does not include the difficulty defendant experienced. The testimony referring to the arthritic changes, leaves ample room for the inference that none of the "catches" in the hip nor back were, in July, 1930, indications to defendant that he had "disease of the spine" or rheumatism, lumbago or gout.

It is true that defendant made the certificate of truthfulness of his statements and answers after the answers were written. According to his testimony they were true in the light of the interpretation placed thereon by the man who interpreted the questions for him and recorded his answers. The court believed defendant and we cannot say he should not have. We see nothing in defendant's medical history which indicates that he misrepresented facts or gave false answers to any question in Part II, especially in view of his testimony that he answered the questions after they were interpreted to him by the medical examiners, and in view of Rissinger's supporting testimony. The questions were for the trial court.

We need not consider the other issue raised.

We have read the principal cases cited by both parties and find nothing in them which is applicable here. We cannot say there was anything learned by defendant after the application was made which indicated to him that answers given by him were false when made. This consideration distinguishes the instant case from those cited where the applicant by retaining the policy, with knowledge, adopted false statements. Other cases have to do with false answers. What

testified that in 1934 he was employed by the United States
between 1935 and 1936. He testified that he was not
could reasonably be expected to have been in the United States
office of the United States, at Washington, D.C., in 1934.
in the United States, and he testified that he was not
think and believe that he was not in the United States
the difficulty of finding out what was going on in the
athletic community, and he testified that he was not
the 'athletic' community, and he testified that he was not
to determine if he was in the United States, and he testified

or about.

At the time he was in the United States, he testified
which he was in the United States, and he testified
description of the United States, and he testified
position of the United States, and he testified
for him and his family, and he testified
we cannot say that he was in the United States, and he testified
medical history of the United States, and he testified
which he was in the United States, and he testified
testimony that he was in the United States, and he testified
to him by the medical community, and he testified
testimony, and he testified that he was in the United States,
a need for a witness, and he testified that he was in the United States.

He has read the United States, and he testified
that nothing in the United States, and he testified
was anything in the United States, and he testified
which testified to his name wherever lived D. He testified that he was
This consideration of the United States, and he testified
where the applicant by residing in the United States, and he testified
false statements. Other cases have to do with false statements, and

we have said hereinabove is sufficient to distinguish them. There is no fraudulent intent indicated here as there was in the Western and Southern Life Insurance Company v. Tomasun, 358 Ill. 496.

On the question of the ear discharge, if that can be considered a misrepresentation, we think the question of its materiality was for the trial court. This is sufficient to distinguish Weinstein v. Metropolitan Life Ins. Co., 60 N. E. (2d) 207 (Ill.).

Under all the circumstances, we think the trial court's judgment is right and it is hereby affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. CONCURS.

LEWE, J. TOOK NO PART.

we have said heretofore is sufficient to establish that, there

is no fraudulent intent involved here in this

Western and Southern Life Insurance Company v. Brown, 111 Ill. 407,

on the question of the act charged, it was not considered a

misrepresentation, we think the question of its materiality was for

the trial court. This is sufficient to establish that

Metropolitan Life Ins. Co., 20 Ill. 2d 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

Under all the circumstances, we think the trial court's

judgment is right and it is hereby affirmed.

JOHN W. BROWN, JR.

BURKE, J. W. BROWN, JR.

LEWIS, J. W. BROWN, JR.

42995

LEON BROWNSTEIN, a minor, by ANNA
BROWNSTEIN, his mother and next
friend,

Appellant,

v.

ELECTRIC HOUSEHOLD UTILITIES
CORPORATION, a corporation, and
HURLEY MACHINE COMPANY, a corporation,
impleaded with TROY SUNNYSIDE BUILDING
INC., a corporation,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

82614-66

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal, Leon Brownstein, a minor, seeks to reverse a judgment in favor of the defendants Electric Household Utilities Corporation, a corporation, and Hurley Machine Company, a corporation, impleaded with Troy Sunnyside Building, Inc., a corporation, entered on the verdict of a jury which found for defendants in a suit for personal injuries resulting from the alleged negligent maintenance of an electrically operated washing machine. Plaintiff's motion for a new trial was overruled.

The evidence discloses that at the time of the accident, June 3, 1942, the plaintiff was about 4½ years of age and had been residing with his parents during the preceding year in the premises located at 4452 Troy Street in the City of Chicago, known as the Troy Sunnyside Building. This building, consisting of 21 apartments, was owned and operated by the defendant Troy Sunnyside Building, Inc., a corporation. It had four laundries located in the basement thereof, the use of which was assigned to certain tenants occupying the building. The laundry used by the Brownstein family was about 75 feet long, 11 feet wide and 9½ feet high and contained four wash tubs, lockers, and a movable coin-operated electric washing

LEON BROWNSTEIN, a minor, by ANNA
BROWNSTEIN, his mother and next
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Appellant,

v.

ELECTRIC HOUSEHOLD UTILITIES
CORPORATION, a corporation, and
HURLEY MACHINE COMPANY, a corporation,
impleaded with TROY SUNNYVALE BUILDING
INC., a corporation,

Appellees.

CIRCUIT COURT

COOK COUNTY,

32314-60

MR. JUSTICE LEAH DELIVERED THE OPINION OF THE COURT.

By this appeal, Leon Brownstein, a minor, seeks to reverse a judgment in favor of the defendants Electric Household Utilities Corporation, a corporation, and Hurley Machine Company, a corporation, impleaded with Troy Sunnyvale Building, Inc., a corporation, entered on the verdict of a jury which found for defendants in a suit for personal injuries resulting from the alleged negligent maintenance of an electrically operated washing machine. Plaintiff's motion for a new trial was overruled.

The evidence discloses that at the time of the accident, June 3, 1942, the plaintiff was about 4½ years of age and had been residing with his parents during the preceding year in the premises located at 4452 Troy Street in the City of Chicago, known as the Troy Sunnyvale Building. This building, consisting of 21 apartments, was owned and operated by the defendant Troy Sunnyvale Building, Inc., a corporation. It had four laundries located in the basement thereof, the use of which was assigned to certain tenants occupying the building. The laundry used by the Brownstein family was about 75 feet long, 11 feet wide and 9½ feet high and contained four wash tubs, lockers, and a movable coin-operated electric washing

machine. Entrance to the laundry room was gained through a door which according to the testimony of defendants' witnesses was equipped with a Corbin lock attached on the inside. The lock was located about $3\frac{1}{2}$ feet above the bottom of the door, and locked automatically whenever the door was closed. To unlock it a key furnished by the landlord to each tenant was used.

The washing machine in question was placed in the laundry room by the defendants for the convenience of the tenants under a written contract between the Troy Sunnyside Building, Inc. and the other defendants, which provided that the Troy Sunnyside Building, Inc. was to receive 15 per cent of the proceeds and the operating condition of the machine was to be maintained by the other defendants. By placing a ten-cent coin in a receptacle attached to the machine and turning a knob the machine could be set in motion for approximately 30 minutes. If the operator of the washing machine turned it off before using it for the entire period, such unexpended energy could be utilized by again turning the knob.

The gist of the amended complaint was that the defendant Troy Sunnyside Building, Inc., was in possession, control and management of the building and the defendants Electric Household Utilities Corporation and Hurley Machine Company were engaged in the business of selling and leasing for hire and reward electric power-driven washing machines; that many of the families of the tenants had children of tender years who played in the basement of the building in the immediate proximity of the washing machine with the knowledge and consent of the defendants; that insertion of the requisite coin would release sufficient energy to keep the machine in motion for 30 minutes and that if the machine was not kept in motion for that period the residue of such unexpended energy would enable anyone to put the machine in motion by using

machine. Entrance to the laundry room was gained through a door which according to the testimony of defendant, witnesses were equipped with a Corbin lock attached on the inside. The lock was located about 3 1/2 feet above the bottom of the door, and locked automatically whenever the door was closed. To unlock it a key furnished by the landlord to each tenant was used.

The washing machine in question was located in the laundry room by the defendant for the convenience of the tenants under a written contract between the Troy Sunnyside Building, Inc. and the other defendant, which provided that the Troy Sunnyside Building, Inc. was to receive 15 per cent of the proceeds and the operating condition of the machine was to be maintained by the other defendant. By placing a ten-cent coin in a receptacle attached to the machine and turning a knob the machine could be set in motion for approximately 30 minutes. If the operator of the washing machine turned it off before being it for the entire period, such unexpended energy could be utilized by again turning the knob.

The gist of the amended complaint was that the defendant Troy Sunnyside Building, Inc., was in possession, control and management of the building and the defendant Electric Household Utilities Corporation and Hurley Machine Company were engaged in the business of selling and leasing for hire and reward electric power-driven washing machines; that many of the families of the tenants had children of tender years who played in the basement of the building in the immediate proximity of the washing machines with the knowledge and consent of the defendant; that insertion of the requisite coin would release sufficient energy to keep the machine in motion for 30 minutes and that if the machine was not kept in motion for that period the residue of such unexpended energy would enable anyone to put the machine in motion by using

the starting and stopping device on the machine, which was easily accessible to children of tender years who might be then playing about the premises. The amended complaint further alleged that the defendants negligently and carelessly neglected to provide some sort of safeguard to prevent children of tender years from starting the washing machine; and that the defendants allowed and permitted children of tender years to play in close proximity to said washing machine.

The defendants filed answers denying substantially all of the charges of negligence in the amended complaint. Afterwards the defendant Troy Sunnyside Building, Inc. filed an amendment to its answer averring that "plaintiff was a licensee or trespasser on that part of the premises where the accident is alleged to have taken place, and that the only duty it owed him was not to wilfully and wantonly injure him."

Plaintiff Leon Brownstein's testimony shows that about 2 o'clock p.m. on June 3, 1942 he entered the laundry room in question to get a drink of water from a faucet in a wash tub immediately adjacent to the electric washer and that as he went by the electric washing machine he "kicked it" and it started in motion, and that while it was in motion his right hand was caught in the rollers of the wringer, causing the injuries complained of; that he entered the laundry room alone and that he never saw boys play there before; that this was the first time he entered the laundry room in question. The undisputed evidence is that Bertha Gold, a tenant, entered the laundry room by the use of a key furnished by the landlord, at about 10 o'clock in the morning on June 3, 1942, and used the washing machine in question for about an hour. She testified that, as she left, "I closed the door. It had a patent lock on it." A careful examination of the record fails to disclose how the plaintiff gained admission to the laundry room. The

the starting and stopping device on the machine, which was easily accessible to children of tender years who at the time of playing about the premises. The amended complaint further alleged that the defendants negligently and carelessly neglected to provide some sort of safeguard to prevent children of tender years from starting the washing machine; and that the defendants allowed and permitted children of tender years to play in close proximity to said washing machines.

The defendants filed answers denying substantially all of the charges of negligence in the amended complaint. The answer of the defendant Troy Laundry Building, Inc., filed an amendment to its answer averring that "plaintiff was a licensee or trespasser on that part of the premises where the accident occurred and was engaged to have taken place, and that the only duty it owed him was not to willfully and wantonly injure him."

Plaintiff Leon Brownstein's testimony shows that about 2 o'clock p.m. on June 3, 1944 he entered the laundry room in question to get a drink of water from a faucet in a wash tub immediately adjacent to the electric washer and that as he went by the electric washing machine he "kicked it" and it started in motion and that while it was in motion his right hand was caught in the rollers of the wringer, causing the injuries complained of; that he entered the laundry room alone and that he never saw boys play there before; that this was the first time he entered the laundry room in question. The undisputed evidence is that Bertha Gold, tenant, entered the laundry room by the use of a key furnished by the landlord, at about 10 o'clock in the morning on June 3, 1944, and used the washing machine in question for about an hour. She testified that, as she left, "I closed the door. It had a patent lock on it." A careful examination of the record fails to disclose how the plaintiff gained admission to the laundry room. The

testimony of the witnesses is in hopeless conflict, but despite the conflicting evidence we think there was sufficient evidence to justify a jury in finding (1) that the Corbin lock was placed on the door of the laundry room several years before the Brownstein family became tenants; (2) that keys were furnished each tenant, including the Brownstein family, for the use of the laundry room; (3) that children of the tenants did not use the laundry room as a play room; and (4) that the electric washing machine was inspected two days before and on the day following the accident June 3, 1942, and found to be functioning properly.

Plaintiff's theory is that plaintiff and other children were constantly playing in the laundry room near the washing machine, which could be started by a jar if there was any available electric power unexpended after the insertion of a coin; that it was the duty of defendants to guard the children from danger of injuries that might result therefrom, which they negligently failed to do.

Defendants' theory is that plaintiff was in the laundry room without the express or implied permission of the defendants.

Plaintiff's principal contention is that the court erred in giving Instruction number 1, which reads as follows:

"1. The court instructs the jury that if you believe, from the evidence, that the plaintiff was in the laundry room of the defendant, Troy Sunnyside Building, Inc., where he was injured, without the express or implied permission of the said defendant, he was a trespasser, and the duty owed to a trespasser by an owner of property is simply to refrain from wantonly and wilfully injuring him."

In their brief, plaintiff's counsel allege that the phrase "without the express or implied permission of said defendant" which appears in the instruction does not state the law correctly. In support of this position, plaintiff stresses the case of Gritton v. Illinois Traction, Inc., 247 Ill. App. 395, where it appears that for a period of two years children residing in the vicinity used an electric switch track, which had overgrown with vegetation,

testimony of the witnesses is in complete conflict, but despite the conflicting evidence we think there was sufficient evidence to justify a jury in finding (1) that the Gordon family was placed on the floor of the laundry room several years before the Brownstein family became tenants; (2) that days were furnished each tenant, including the Brownstein family, for the use of the laundry room; (3) that children of the tenants did not use the laundry room as a play room; and (4) that no electrical wiring or line was installed two days before and on the day following the accident June 3, 1933, and found to be functioning properly.

Plaintiff's theory is that electrical and other children were constantly playing in the laundry room and the wiring therein which could be started by a jar if there was any electrical electric power ungrounded after the insertion of a plug; and it was the duty of defendant to guard the children from danger of electrical that might result therefrom, which they negligently failed to do. Defendant's theory is that electrical was in the laundry room without the express or implied permission of the defendant. Plaintiff's principal contention is that the court erred

in giving instruction number 1, which reads as follows:

"1. The court instructs the jury that if you believe from the evidence, that the plaintiff was in the laundry room of the defendant, Troy Humphreys Building, Inc., where he was injured, without the express or implied permission of the said defendant, he was a trespasser, and the duty owed to a trespasser by an owner of property is simply to refrain from intentionally and willfully injuring him."

In their brief, plaintiff's counsel claims that the phrase "without the express or implied permission of said defendant" which appears in the instruction does not state the law correctly. In support of this position, plaintiff attaches the case of Hutton v. Illinois Traction, Inc., 247 Ill. App. 398, where it appears that for a period of two years children residing in the vicinity used an electric switch track, which had overgrown with vegetation,

as a playground. The plaintiff, a minor nine years of age, was burned by a broken trolley feed wire which dangled from a pole about a foot above the ground. At page 401, the court said:

"If an owner maintains dangerous conditions upon his premises to which he permits children to come he must use ordinary care to guard them against danger which their youth and ignorance prevent them from appreciating. There is no implied invitation from the mere existence of a dangerous attraction which is not discoverable off the premises, but if to the knowledge of the owner children habitually come upon his premises where a dangerous condition exists to which they are exposed, the duty to exercise care for their safety arises, not because of an implied invitation but because of his knowledge of unconscious exposure to danger which the children do not realize."

On the oral argument, counsel for plaintiff cited the recent case of Powell v. Weiner, 325 Ill. App. 297 (Abst.), contending that the question determined therein is no nearly analogous to the one presented in the instant case that it should be controlling. An examination of that opinion discloses that children of tender age had access to the laundry room at all times; that the door had no lock, nor were keys furnished to the tenants using the laundry room, as in the instant case.

We have analyzed the cases cited by the plaintiff and are of the opinion that they have no application to the factual situation in the case at bar.

Defendants were entitled to an instruction based on their theory. (Thomas v. Chicago Embossing Co., 307 Ill. 134, 140-141.) In support of their position, defendants stress the cases of Cunningham v. Toledo St. L. & W. R. R. Co., 260 Ill. 589; Prickett v. Pardridge, 189 Ill. App. 307; and Darsch v. Brown, 332 Ill. 593. In the Darsch case the court said, at page 596:

"Under our decisions, which are most liberal to children, if the conditions are such that the owner may reasonably anticipate that children of such tender age as to be incapable of exercising proper care for their own safety may by their own instincts be attracted to the dangerous thing and thereby exposed to danger, he will be liable for an injury to a child so attracted, resulting from leaving the machine or dangerous thing exposed." (Citing City of Pekin v. McMahon, 154 Ill. 141, and Ramsay v. Tuthill Material Co., 295 Ill. 395.)

as a playground. The plaintiff, a minor nine years of age, was

burned by a broken trolley feed wire which dangled from a pole

about a foot above the ground. At page 401, the court said:

"If an owner maintains dangerous conditions upon his premises so which he permits children to come he must use ordinary care to guard them against danger which their youth and inexperience prevent them from appreciating. There is no implied invitation from the mere existence of a dangerous situation which is not discoverable off the premises, but as to the knowledge of the owner, which habitually come upon his premises where a dangerous condition exists to which they are exposed, the duty to exercise care for their safety arises, not because of an implied invitation but because of his knowledge of unconscious exposure to danger which the children do not realize."

On the oral argument, counsel for plaintiff cited the

recent case of Bowell v. Kainer, 386 Ill. App. 2d 7 (1982).

contending that the question determined therein is no nearly analogous to the one presented in the instant case that it should be controlling.

An examination of that opinion discloses that children of tender age had access to the laundry room at all times; that the door had no lock, nor were keys furnished to the tenants using the laundry room, as in the instant case.

We have analyzed the cases cited by the plaintiff and are of the opinion that they have no application to the factual situation in the case at bar.

Defendants were entitled to an instruction based on their

theory. (Thomas v. Chicago Lumber Co., 307 Ill. 124, 140-141.)

In support of their position, defendants stress the cases of Gunningsham v. Toledo St. L. & W. R. Co., 330 Ill. 683; Trickett v. Farbridge, 189 Ill. App. 307; and Barach v. Brown, 332 Ill. 393.

In the Barach case the court said, at page 395:

"Under our decisions, which are most liberal to children, if the conditions are such that the owner may reasonably anticipate that children of such tender age as to be incapable of exercising proper care for their own safety may by their own instincts be attracted to the dangerous thing and thereby exposed to danger, he will be liable for an injury to a child so attracted, resulting from leaving the machine or dangerous thing exposed." (City of Chicago v. McMahon, 154 Ill. 141, and Ramsay v. Tutill Material Co., 335 Ill. 395.)

In the instant case, if we accept the testimony of the defendants' witnesses as being true, which the jury manifestly did, it seems to us that the defendants exercised every precaution reasonably necessary to protect the plaintiff and other children of his age from acts which the defendants might reasonably anticipate. Defendants' evidence clearly shows that the laundry room in question was not intended by the defendant Troy Sunnyside Building, Inc. for use as a play room for the children of the tenants occupying the premises, and that they did not so use it. The defendant landlord was entitled to such reasonable use of its premises as would be beneficial to it without liability to bare licensees. We think the defendants in the case at bar provided all the protection reasonably necessary under the circumstances to guard the plaintiff against injury, consistent with the reasonable use and operation of the building.

In Siddall v. Jansen, 168 Ill. 43, it appears that the father of the plaintiff was an employee of defendant, and the plaintiff five years of age was playing around defendant's store. In the absence of the father, the plaintiff wandered to an elevator shaft and was severely injured by the descending cage. There the court said, at page 46:

"An ascending and descending cage of an elevator might be said to be of such character, and to hold out an implied invitation to a five year old child."

And again, at page 47:

"Whether or not plaintiff was a trespasser was also a question of fact for the jury where there was evidence tending to show he was not."

The jury accepted the defendants' version of the accident, which was amply justified by the testimony. In applying the principles of the cases hereinabove cited to the facts of this case, we do not think that plaintiff's objection to defendants' instruction number 1 is tenable.

For the reasons indicated, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

In the instant case, it is accepted that the testimony of the defendants, witnesses as being true, and the jury naturally did, it seems to us that the defendants exercised every precaution

reasonably necessary to protect the plaintiff and other children of his age from acts within the defendant's right reasonably anticipated.

Defendants' evidence clearly shows that the January room in question was not intended by the defendant for outside walking, but for use as a play room for the children of the tenants occupying the premises, and that they did not so use it. The defendant

landlord was entitled to such reasonable use of the premises as would be beneficial to it without liability to any licensee. We think the defendant in this case did provide all the protection reasonably necessary under the circumstances to guard the plaintiff against injury, consistent with the reasonable use and enjoyment of the building.

In Albany v. Jensen, 188 Ill. 47, it appears that the

father of the plaintiff was an employee of defendant, and the plaintiff five years of age was playing around defendant's place. In the absence of the father, the plaintiff wandered to an elevator shaft and was severely injured by the descending cage. There the

court said, at page 46:

"An ascending and descending cage of an elevator might be said to be of such character, and to hold out an implied invitation to a five year old child."

And again, at page 47:

"Whether or not plaintiff was a trespasser was also a question of fact for the jury where there was evidence tending to show he was not."

The jury accepted the defendants' version of the accident,

which was amply justified by the testimony. In applying the principles

of the cases hereinabove cited to the facts of this case, we do not

think that plaintiff's objection to defendants' instruction number

1 is tenable.

For the reasons indicated, the judgment of the circuit

court is affirmed.

JUDGMENT AFFIRMED.

KILBY, P. J. AND BURKE, J. CONCUR.

43208 and 43251

CHARLES B. ROWE,

Appellant,

v.

VROOMAN CARPET CO., INC.,
a corporation, et al.,

Appellees.

VROOMAN CARPET CO., INC.,

Appellee,

v.

CHARLES B. ROWE and
THEODORE A. KOLB,

Defendants.

326 I.A. 167¹

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

ON APPEAL OF THEODORE A. KOLB,

Appellant.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Pursuant to a motion made in this court and allowed,

these cases were consolidated.

August 9, 1943 the Vrooman Carpet Company sued plaintiff herein and Mrs. Rowe upon an open account before a justice of the peace in Berwyn, Illinois. On return day, August 20, the cause was set for hearing August 27th. The defendant failed to appear and judgment was entered against him for \$215 and costs. Execution issued December 16, 1943 and Constable Braisle seized property in plaintiff's home.

43208

In this cause plaintiff on February 7, 1944 sued for a writ of certiorari to review the judgment of the justice of the peace, for an injunction, the return of property seized, for damages and for other relief. February 8 the writ of certiorari issued and February 9 an order was entered restraining the constable from disposing of the property seized.

CHARLES E. ROWE,

Appellant,

v.

WISCONSIN CEMENT CO., INC.,
a corporation, et al.,

Appellees.

WISCONSIN CEMENT CO., INC.,

Appellee,

v.

CHARLES E. ROWE and
THEODORE A. KOHN,

Defendants.

ON APPEAL OF THEODORE A. KOHN,

Appellant.

MR. JUSTICE KILPATRICK delivered the opinion of the court.

Argument to a motion made in this case was heard.

These cases were consolidated.

August 2, 1943 the program of the court was as follows:

Therein and Mrs. Rowe upon an open account before a Justice of the

peace in Berwyn, Illinois. On return day, August 20, the cause was

set for hearing August 27th. The defendant failed to appear and judgment

was entered against him for \$15 and costs. Judgment entered August 15,

1943 and Constable Brails seized property in defendant's home.

45208

In this case plaintiff on February 7, 1944 sued for a

writ of certiorari to review the judgment of the Justice of the

peace for an injunction, the return of property seized, for

damages and for other relief. February 8 the writ of certiorari

issued and February 9 an order was entered restraining the

constable from disposing of the property seized.

February 21 the defendants filed their appearance and March 3 an order was entered finding that the writ having issued and the equitable relief prayed for having been granted, the cause should be transferred to the Executive Committee for reassignment to a law judge. March 6 defendants made a motion to dismiss the cause on the ground that the complaint improperly joined the application for the certiorari to the other relief prayed. The same day defendant moved to quash the writ. May 5 an order was entered quashing and dismissing the writ and denying leave to file an "amended petition" for a writ of certiorari. May 25 plaintiff moved to vacate the order of May 5 and on May 31st moved for leave to amend the complaint so that the cause proceed "as a case in equity," and praying that the execution and enforcement of the justice court judgment be enjoined and that if the amendment be rejected that the cause proceed on the matters, other than the certiorari, contained in the original complaint. May 31 the court entered an order finding that the motion to vacate was filed without leave of court and denied the motion and rejected the amendment. Plaintiff has appealed from the order of May 5 quashing the writ and dismissing the "petition" for certiorari and denying leave to amend the petition, and from the order of May 31.

While the record shows a motion to dismiss the cause was filed by defendants, it does not appear that the motion was ruled upon. That matter, therefore, is not before us.

In order for plaintiff to prevail in the certiorari proceeding, it was necessary that the petition disclose, among other things, that the judgment, subject of the proceeding, was not the result of plaintiff's negligence. Chap. 79, Par. 187, Sec. 76 Ill. Rev. Stats. 1943; Couch v. Illinois Central R. R. Co., 231 Ill. App. 429; Chicago Stamping Company v. Danley, 85 Ill. App. 322; and Schmitt v. Hines Lumber Co., 124 Ill. App. 319. Apparently,

section 76 was not repealed by the Act of June 26, 1895 relating to justices of the peace. Budd v. Wagner, 255 Ill. App. 523; Tongeln v. Knoll, 227 Ill. App. 317; Clark v. City of Chicago, 233 Ill 113.

It is plain from the petition that neither plaintiff nor his lawyer, who was employed after judgment was entered, was prudent in his conduct in attempting to protect plaintiff. Plaintiff absented himself from the court on the date of the judgment though he knew the case was set for that day, and neither he nor his attorney consulted the records of the court after they were informed of the entry of the judgment. They relied upon oral promises of Vrooman that the action would be discontinued, case continued and the judgment vacated. Similar conduct has been held to fall short of the requirements for certiorari. Schmitt v. Hines Lumber Co., 124 Ill. App. 319. There was nothing in the rejected amendment which tended to supply the deficiencies in the allegations, basis of the certiorari proceeding. We believe the order quashing the writ and dismissing the certiorari proceedings and denying leave to amend the "petition" for certiorari was correct.

The record does not show that the court gave leave to the plaintiff prior to his filing of the motion to vacate, nor that he sought leave at the time the order was entered. It is true that the order quashing the writ, etc., did not dispose of all the matters alleged in his complaint, but there was no reason shown by the motion to vacate, why it should be allowed. We have said the motion to dismiss is not before us. Under the circumstances in this case, however, we believe we should point out that the Civil Practice Act did not envision the complex complaint filed in this cause by plaintiff.

For the reasons given the order is affirmed.

ORDER AFFIRMED.

BURKE, P.J. CONCURS;
Lewe, J. took no part.

Upon his appeal from the judgment before the justice of the peace, plaintiff filed a bond with Theodore A. Kolb, as surety. They bound themselves to the Vrooman Company in the sum of \$500 with the condition that if plaintiff prosecuted the certiorari with effect and paid whatever judgment was rendered against him by the Circuit Court, or in case the appeal was dismissed, pay the judgment against him in the action before the justice of the peace, the obligation to be void. Following the entry of the order quashing the writ, etc., in the Circuit Court, the Vrooman Company commenced suit against plaintiff and Kolb upon the bond. Kolb defended on the ground of the appeal in the Circuit Court case. Judgment was for Vrooman Company in the sum of \$208. Kolb has appealed. He says the question is whether the appeal in Case No. 43208 "without bond" is a final judgment pending appeal.

The Circuit Court dismissed the appeal from the justice of the peace court and there was no stay of the order during the pendency of the appeal to this court. The justice of the peace judgment not being paid, the obligation was in force. The pendency of the appeal in the Circuit Court case was the only defense offered by Kolb in the Municipal Court. The judgment against him is hereby affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., CONCURS;
LEWE, J. TOOK NO PART.

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BUREAU OF THE
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43221

EDITH A. BROWN,
Appellant,

v.

WILLIAM A. BROWN,
Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

32 I.A. 67

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a separate maintenance proceeding in which the trial court dismissed the complaint for want of equity. Plaintiff has appealed.

The parties were married in 1920 and lived in Stuart, Nebr. for 5 years on a farm. Their child Constance was born there in 1923. In 1925 they came to Chicago where defendant worked in the U. S. Postal Department until 1942. In March 1942 he came into the inheritance of his father's estate of 320 acres of land in Stuart, Nebr. In April 1942 he left Chicago and took possession of the farm. Plaintiff and Constance remained in Chicago.

Plaintiff filed her action in October 1942 charging that defendant deserted her without cause. Defendant answered that he left Chicago upon advice of his physician and that plaintiff refused to accompany him to Nebraska, although he had often requested her to do so. In his answer he invited her to resume her life with him as his wife.

The question is whether defendant deserted plaintiff. The parties agree that her residence followed his. We believe that unless he prevented her from following him in some way, that she was bound to go to Nebraska.

Plaintiff and defendant both worked in Chicago and were happy together. They treated each other well. Constance attended DePaul University and studied music. In 1941 and 1942 defendant began to lose weight and says that he was advised by

EDITH A. BROOKS
Defendant

v.

WILLIAM A. BROOKS
Plaintiff

trial court divided the community property of the parties
this was requested.

The parties were married in 1921. The parties were
happy for 5 years. In 1926, the parties were
there in 1926. In 1926, the parties were
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Chicago.

Plaintiff filed her petition in 1926. The parties
that defendant was not a party to the community property.
the parties were married in 1921. The parties were
this refused to accept the community property of the parties.
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The parties in 1926. The parties were married in 1921.
The parties agree that her husband followed her. The parties
that unless he requested her from the community property.
that she was bound to go to the community property.

Plaintiff and defendant were married in 1921 and
were happy together. They treated each other well. Defendant
attended DePaul University and studied music. In 1921 and 1922
defendant began to lose weight and says that he was advised by

his physician to leave Chicago. Plaintiff denies the doctor gave that advice, but admits defendant lost weight. Defendant signed a year's lease for a Chicago apartment in March of 1942, but says he expected plaintiff and Constance to follow him in June when Constance was out of school. Plaintiff says that although they discussed living in Nebraska, nothing definite was decided. Constance says that her father wrote her but never asked that she and her mother go to Nebraska. A mutual friend of the parties testified that defendant did not plan to take his family with him.

Defendant says that he asked his wife to accompany him, but that she wanted to stay in Chicago so that Constance could go to school here and continue her music. Plaintiff admits she discussed with defendant the relative merits of De Paul and Nebraska Universities. She testified that she did not want Constance to go through what plaintiff had gone through on the farm. Plaintiff wrote defendant's sister in Nebraska early in the Spring of 1942, asking her to dissuade defendant from leaving Chicago. Plaintiff says that defendant would not let her stay when she went to Nebraska in July of 1942 and told her that the farm was no place for her. Defendant's sister says she heard plaintiff tell defendant when he asked her to stay, that her duty was to her daughter and that she would not live on the farm. Constance referred to the house on the farm as a "monstrosity".

Plaintiff had the burden of proving that defendant deserted her without her fault. The testimony introduced to prove the elements necessary for plaintiff's case was controverted. We believe we have pointed out sufficient to show that we would not be justified in upsetting the decree of the trial court. The court was justified in concluding that plaintiff

his physician to leave Chicago. Plaintiff denies the doctor gave that advice, but admits doctor lost weight. Defendant signed a year's lease for a Chicago apartment in March of 1942, but says he expected plaintiff to continue to follow him in June when defendant was out of school. Plaintiff says that although they discussed living in Chicago, nothing definite was decided. Defendant says he had a few more months but never asked that she move with him to Chicago. Defendant's friend of the same sex testified that defendant did not intend to take his family with him.

Defendant says that he was not in Chicago in 1942, but that he wanted to go to Chicago in 1943 and could go to school there. He testified that he did not go to school there. Plaintiff testified that she discussed the move with the defendant and that he said he would go to Chicago in 1943. Defendant testified that he did not go to Chicago in 1943, but that he was in Nebraska only in the winter of 1943, when he was in defendant's apartment in Chicago. Plaintiff testified that defendant would not let her stay with him in Chicago in 1942 or 1943 and told her that the time was not right for her. Plaintiff's sister says she heard plaintiff tell defendant that he asked her to stay, that he had said that he was leaving and that she would not live on the farm. Defendant testified that he was on the farm as a "housekeeper".

Plaintiff had the burden of proving the defendant deserted her without her fault. The testimony introduced to prove the elements necessary for plaintiff's case was controverted. We believe we have pointed out sufficient to show that we would not be justified in upsetting the order of the trial court. The court was justified in concluding that plaintiff

3.

had not proved that she wanted to accompany or follow her husband in fulfillment of her obligation and that he repelled her.

For the reasons given the decree of the Superior Court is affirmed.

DECREE AFFIRMED.

BURKE, P.J. CONCURS;
LEWE, J. TOOK NO PART.

had not proved that she wanted to be a mother and that she was not a mother in fact. The court found that the husband's conduct was not sufficient to justify a divorce.

The court also found that the husband's conduct was not sufficient to justify a divorce. The court found that the husband's conduct was not sufficient to justify a divorce.

THE COURT FINDS THAT

THE HUSBAND'S CONDUCT WAS NOT SUFFICIENT TO JUSTIFY A DIVORCE.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1945.

A

Term No. 4404

Agenda No. 8.

ADA DILL,
Plaintiff-Appellee,
vs.
ABSALOM PATTERSON,
Defendant-Appellant.

Appeal from the
Circuit Court of
Saline County.

BRISTOW, P. J.

326 I.A. 511

Ada Dill, Plaintiff-Appellee, recovered a judgment against Absalom Patterson, Defendant-Appellant, in the Circuit Court of Saline County, Illinois, in the amount of \$125.00 for the care and support of a girl going by the name of Wendell Hollistine Patterson, to whom we shall hereafter refer as "Hollistine". The Defendant has appealed to this Court asking reversal of this judgment.

Appellee has filed no brief in this Court. Decision of points involved, require determination of the question whether this girl, Hollistine, is a legitimate or an illegitimate child. Because of public interest in its determination and its great importance to such child, we have felt obligated to and have read the abstract and also the full testimony of all witnesses and evidence appearing in the record. This case was tried before the Court, trial by jury having been waived.

Appellee was the mother of Lillie Patterson, now deceased. Lillie Patterson was the mother of this child, Hollistine.

We deem it necessary to set forth some of the salient points in evidence in this case.

Mrs. Lillie Feazel, later Lillie Patterson, had three

small children by a former husband, name Bernadette Feazel, Wallace Feazel and Bernard Feazel. About fourteen years ago, they lived with their mother in the same house. Appellant then began living at this house with the children and their mother, either as a roomer, as he claims; or illegally with Lillie Feazel, as husband and wife, as Appellee claims.

Bernadette Feazel, 21 years old at the date of the trial testified:- That her mother and appellant there lived together and acted like anybody else; that they acted all right; that they all ate at the same table; that Ab furnished the groceries; that appellant and her mother slept together in the same bed-room in the same bed all the time they lived together; and that she and the other children slept in another bed-room. Wallace Feazel, 20 years of age at the date of the trial, testified:- That his mother and appellant lived together in Harrisburg a long time; that he lived together with them; that Ab bought the groceries when they were living together; that they all ate at the same table; that appellant used to send him to the store to buy groceries and direct them to charge them to appellant, and that his mother had likewise so directed him; and that appellant and his mother slept together of nights.

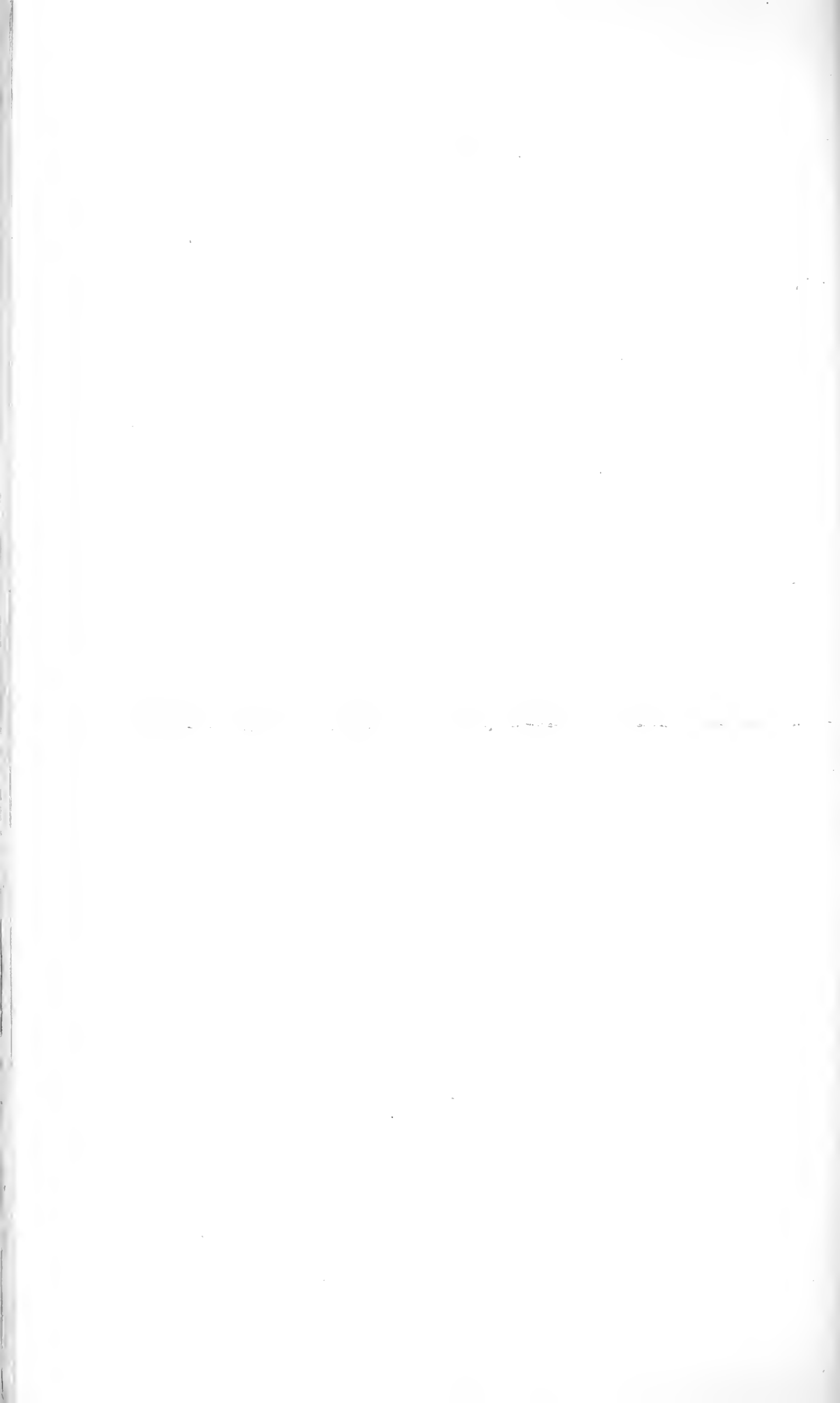
Appellee testified that she was the mother of Lillie Patterson, grandmother of Hollistine, and that she had supported Hollistine from a short time prior to the death of her daughter, Lillie Patterson. She stated that Lillie Feazel and appellant lived together with Mrs. Feazel's children; that appellant lived with her daughter, Lillie, as husband and wife, starting about 14 years ago when they started living together, and when they first went to housekeeping; that they had visited at her house often and that she was at their house almost daily. She testified in regard to a conversation between appellant and herself shortly before the date of the birth of Hollistine in which she asked appellant under what name he would bury her if she should die, and where she said

they might die in such case. She stated, "so they went and got married". She testified that appellant and her daughter had always acted to her like they were married.

Hollistine was born July 4, 1932. Her mother, Lillie, died November 19, 1942. The above mentioned conversation recited by appellee was denied by appellant.

Pearl Allen testified:- That she had visited at the house where appellant and Lillie lived, a lot of times, because they were good friends; that appellant, Lillie and Lillie's children all lived together; that appellant and Lillie always treated each other very nice; that she was in and out almost every day; that they so lived together two years or better; that she had never seen Lillie and appellant in bed together; that she had seen appellant bringing in sacks of groceries and that they all ate together; that appellant and Lillie had another child which had died and she knew the other child was the child of appellant and Lillie because she had their word for it, and that appellant told her it was his baby; that she was there when the other child had died and that Lillie had said it was awful that the baby was dead and they were not even married, and that appellant said it was his baby and he paid its funeral expenses. She testified that both appellant and Lillie Feazel told her that they were going to get married as soon as they could; didn't want his people to know it. She stated that in some recent proceedings in the County Court was the first time she had heard appelland say that he and Lillie were not married.

Appellant testified that he lived at the home of Mrs. Feazel and her children for seven or eight months and that then they were married in February, 1932; that thereafter he and his wife lived together a little over a week when they separated; that later he secured a divorce; that the child Hollistine was born July 4, 1932. He denied that he had had sexual intercourse with Lillie Feazel during the period of 250 to 280 days prior to July 4, 1932, or ever prior to the date of said marriage. He stated that Lillie



Patterson, his wife, formerly Lillie Feazel died November 19, 1942, and that she had in no way claimed him as the father of Hollistine. He stated that he was not the father of Hollistine; that he furnished no one any information to put in the birth certificate which showed him to be the father of Wendell Hollistine Patterson. He denied that he had ever admitted that he was the father of Hollistine. He stated that before said marriage, he was simply a roomer in the home of Lillie Feazel and paid her for his room rent.

Two witnesses testified on behalf of appellant, - John Jones and Verner E. Joyner. John Jones testified that he was a friend of appellant and had visited him at this house before and after marriage; that appellant's room was in the Southwest corner of the 4-room house; that when visiting there he had never seen Lillie Feazel and appellant sleeping together before or after they were married.

Verner E. Joyner, Clerk of the Circuit Court, testified in regard to a certain divorce case, No. 3004, brought by Absalom Patterson against Lillie Patterson. The clerk testified that he could not find that any decree was filed for record in that case. Defendant offered the minutes of the trial judge's docket, which offer was objected to and sustained by the court. The minutes of the judge indicated that on June 14, 1932, a hearing was had. The minutes showed personal service, default, hearing on charge of adultery and divorce in favor of Complainant, Absalom Patterson against Lillie Patterson. It thus appears that the testimony of witnesses, on certain points, were apparently conflicting and that certain facts and statements made by witnesses were not questioned. The trial court heard and saw the witnesses and was in better position to judge of their veracity. We cannot say that the decision and judgment of the trial court were manifestly against the weight of the evidence. But, upon undisputed facts in the case, and the law, we feel that the judgment was correct.

The presumption of legitimacy arises in this case. In

itself, this presumption was amply sufficient to support the judgment. The presumption of legitimacy attaches to every child and must be overcome by clear and convincing proof. One claiming illegitimacy has the burden of establishing that fact. Sugrue vs. Crilley, 329 Ill. 458, 464. This presumption is so strong that it is not overcome by proof of ante-nuptial conception. Zachmann vs. Zachmann, 201 Ill. 380; 7 Am. Jurisprudence-Bastards-Page 637, Sec. 16. The institution or the pendency of a divorce proceeding for months before the time in question will not overcome the presumption of legitimacy. Drennan vs. Douglas, 102 Ill. 341, 344-345. Any child born during marriage is presumed to be legitimate. Orthwein vs. Thomas, 127 Ill. 554, 561-562.

If the trial court believed the testimony of the children of Lillie Feazel, then appellant and Lillie Feazel, as husband and wife, were living and sleeping together long before and after the conception of the child, Hollistine. The proof of the element of access could hardly be more strongly imagined. The court evidently believed these witnesses and the others, for plaintiff. If the court believed these witnesses, then it did not believe the testimony of appellant in his claim that he had never had intercourse with Lillie Fraezel until after his marriage to her in February, 1932. The evidence indicated the birth of another child to appellant and appellee which had died, and whose burial expenses he had paid. If the court believed the testimony in regard to appellant's admission in regard to this child that died, his statement that he had never had such intercourse, was false. It is true that the parentage of this child that died is not the issue for determination here, but it was proper evidence on the question of access and whether appellant testified truthfully when he said he had never had intercourse with Lillie Feazel before February, 1932.

We find ample competent evidence in the record to support the finding and judgment of the trial court. Whether the birth certificate was properly admitted in evidence without first adducing

proof that appellant authorized the statements therein of the name of the child as Patterson, could not change the finding. The date of the birth of Hollistine was otherwise proved. The court found that Hollistine was the legal child of Absalom Patterson. It is therefore proper that in the birth certificate she should be designated by the name of Patterson.

The trial court was justified in finding under the evidence of facts and circumstances appearing in evidence in this case that the appellant and Lillie Feazel were living together in the relationship of a common law marriage. Common Law marriage was void under the law. But there was a subsequent legal marriage. Testimony of defendant regarding this marriage can only be held to be a marriage, under license, which then, under the law, was legal. This marriage removed the question of legitimacy of Wendell Hollistine Patterson by virtue of the Statute. Illinois Revised Statute, Ch. 89, - Marriages - Section 4. By virtue of this legal marriage, and the Statute, Wendell Hollistine Patterson became and is and is deemed to be the legitimate child of appellant and her mother, Lillie Patterson.

The questions of fact have been determined by the trial court, and since we cannot say that the determination of the trial court is against the manifest weight of the evidence, it becomes and is our duty to affirm the judgment in this case. Wendell Hollistine Patterson being the lawful child of appellant, it becomes and is the duty of appellant to provide for her support.

Accordingly, the judgment should be, and hereby is, affirmed.

JUDGMENT AFFIRMED.

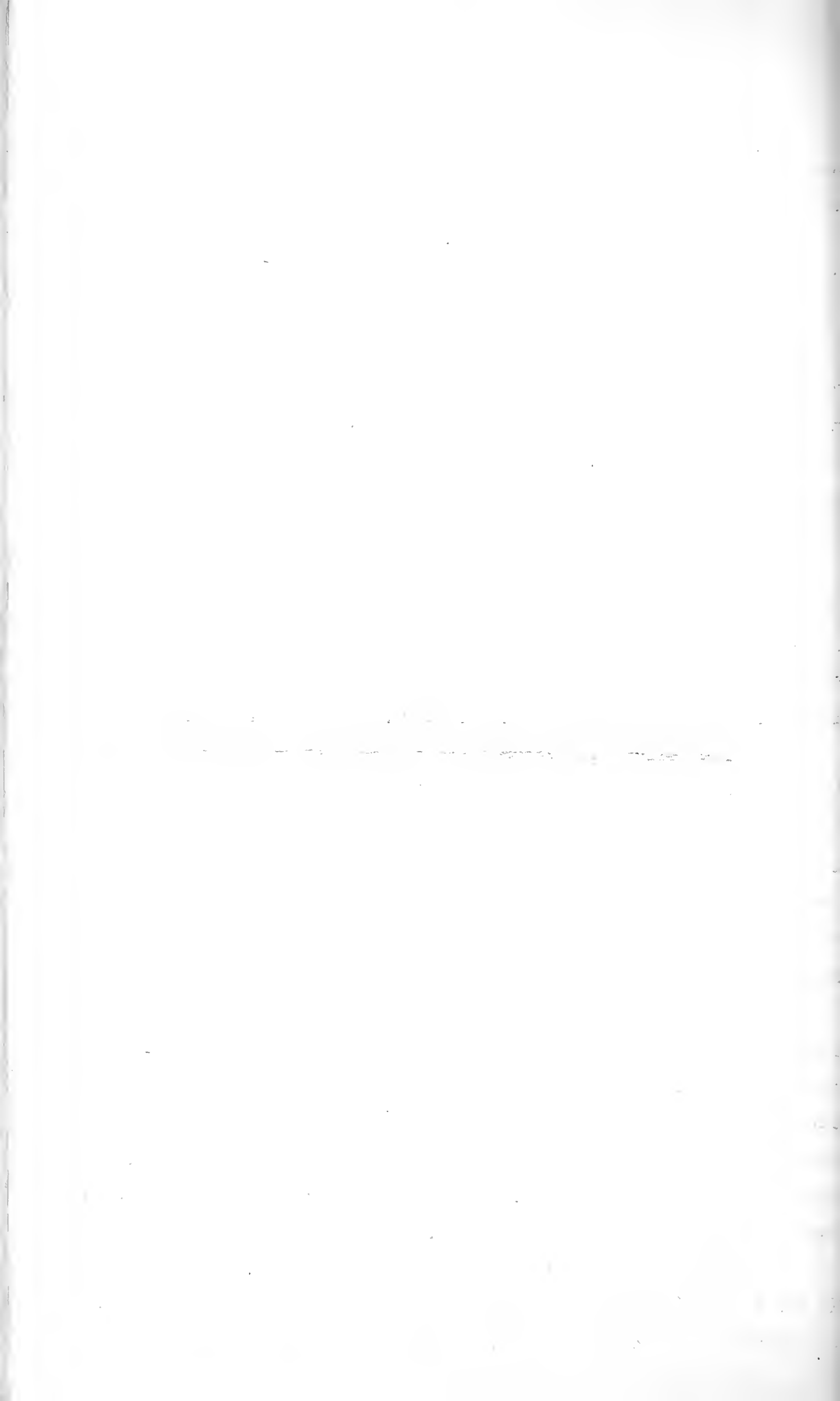
Abstract.

FILED
JUL 7 1945
Clayton R. Brown
CLERK OF THE COURT

A

Agenda No. 2.

32614.5121



she has since lived, and on October 24, 1943 she gave birth to a child at her mother's home in Wood River.

The mother of Plaintiff in Error, by request of the States Attorney, was a Court's witness. She testified that, on December 4, 1943, she went to a coal shed at the rear of her premises, about seventy-five feet from the house, and that a dog ran out of the open door of the shed. On the board floor, inside, near the door, she found a badly mutilated object, covered with dirt. She called a neighbor lady and the police. The coroner later took possession of the body. It was the dead body of a white child.

Witnesses testified in regard to an autopsy on the child, stating that it was living, at birth. The doctor testified that, with the consent of Plaintiff in Error, he examined her on December 6, 1943, and that the examination showed that she had given birth to a child within the preceding two or three months.

The police, the coroner and a newspaper reporter testified that to them or in their presence, verbally and by two lengthy typewritten statements, signed by Plaintiff in Error, that Plaintiff in Error had made certain admissions. On December 6, 1943, she was taken into custody. She denied she had given birth to a child. She readily agreed to submit to an examination by a doctor. On December 7th and on December 13th, 1943, and after several lengthy sessions with the States Attorney and his assistants, the coroner and police officers, Plaintiff in Error made a statement regarding the affair, which was reduced to writing, and signed by her. The coroner stated that Plaintiff in Error told him the name of the father of her child by writing the name down on a piece of paper, which he had misplaced. He said the name was not that of her husband, but that he could not remember the name she had written.

The two signed statements were introduced in evidence. In these statements she said she had become pregnant the latter part of January or in February, 1943; and in the statement recited at

great length and in detail the facts of the birth of a child to her, on October 24, 1943. The substance is, that on that day she became sick, thinking she had been poisoned by food she had eaten; that she was home and in bed; that the child was born; that her mother and brother left the house without any knowledge of the occurrence; that after an hour or so, she wrapped a newspaper around the child which then was not living; that she took the body to this coal shed, sat down and thought for quite some time; and then buried it in the dirt floor of the coal shed; and that no member of the family or anyone else knew that she had been pregnant, and had given birth to a child and had buried it.

Testimony that had been given by Plaintiff in Error, her mother, and a witness, at the divorce suit, was introduced in evidence. There she testified, that in 1941, when she came home from work, her husband was gone and that she hadn't seen him since or lived with him since. The mother and the witness who testified at the divorce proceeding said that Plaintiff in Error and her husband had not lived together since their separation.

As the court's witness in the trial below, the mother testified that she didn't know her daughter and son-in-law had separated; that they were not living together. When asked whether she had seen her son-in-law in Wood River after May or June, 1941, she made the reply, "No, I guess she did." When again asked whether she had seen him after May or June, 1941, she said she believed she had one time down town, that she was pretty sure she did. She testified that her son-in-law went into military service in the army in 1941, and that she thought he was discharged from the army later. She testified that her daughter and her son-in-law corresponded by mail, that she guessed he lived in Cairo, Illinois; and that he had sent his picture in uniform to his wife. The mother-in-law further testified that her son-in-law was discharged from and was out of the army for sometime and then went back, in May, 1943. She was asked if during that period of time, Catherine



wrote to him and he to her, and she replied, "yes". As to whether she knew he was in Wood River any period before May, 1943, she replied, "I believe he was. I am pretty sure of that, and part of the time in Cairo, Illinois". She stated she wouldn't know whether her daughter saw Clifton Managhan or not.

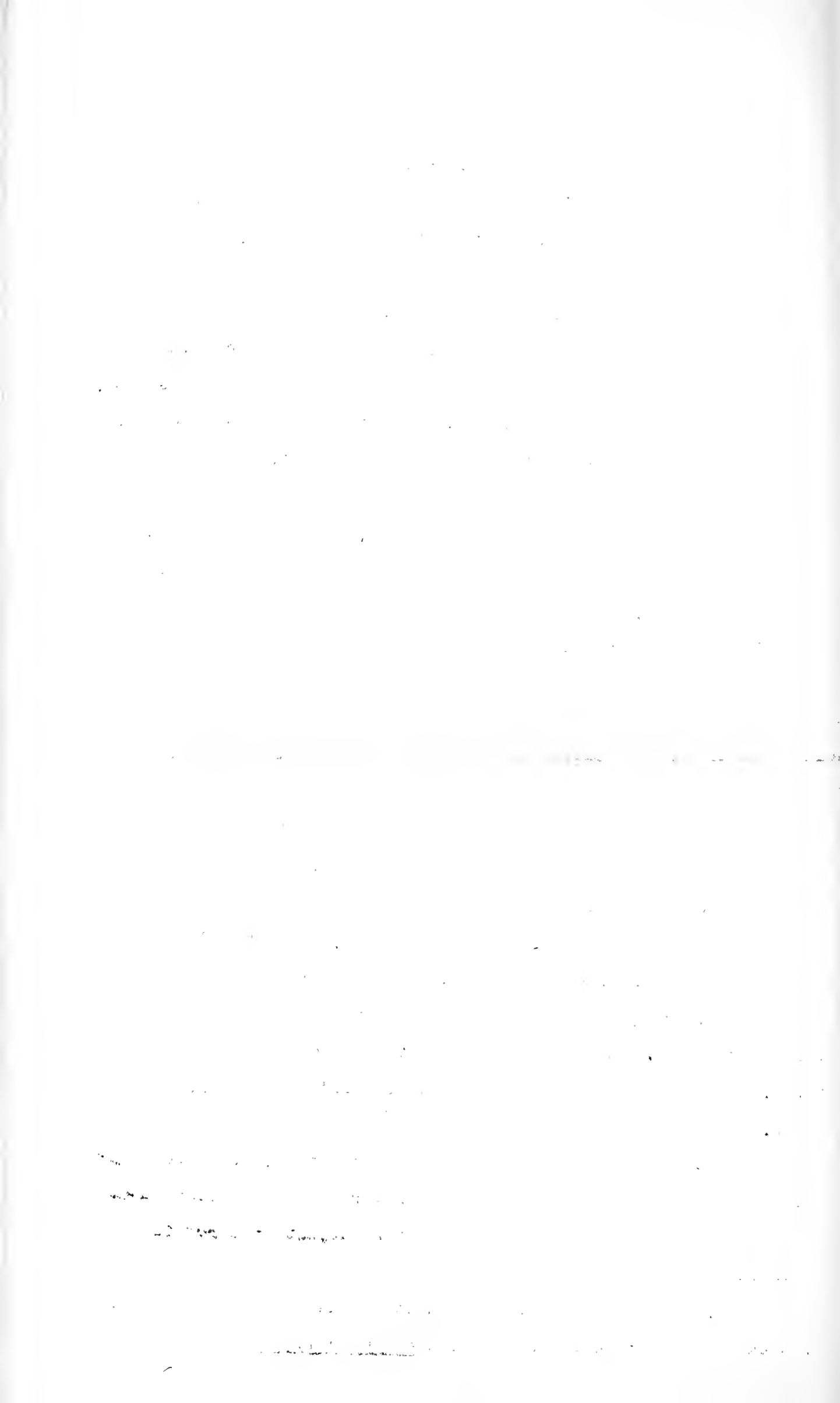
The above was all the material proof introduced in the case. Strenuous objection to introduction of most of the testimony and exhibits was made by the defendant, but all the objections were overruled. Defendant did not testify at the trial.

For about fourteen lines on the first page of the argument, Plaintiff in Error, by a general statement, refers to the voluminous testimony; objections made regarding the condition of the child's body; the inquest; and statement of the physicians. She then concludes that a large part of the testimony has no bearing and that the effect was to inflame the jury and give it the impression that the defendant must be guilty of something.

It was the duty of the Plaintiff in Error to explicitly point out testimony objected to and to give reasons why the court erred in overruling objections. The fourteen line general statement is not of much assistance to a court of review. Defendant in Error asserts that the Plaintiff in Error has not saved the points of objection, in that she has not been specific, nor covered objections by her assignments of error. Defendant in Error then proceeded at quite some length, to argue in support of the propriety of such testimony, to admission of which objections had been made at the trial. We believe that quite a few of the objections were well taken.

But, since on very careful consideration, we believe that this judgment of conviction should be reversed on the record made, we will not give further attention to the subject of error in admission of evidence.

Plaintiff in Error has almost exclusively addressed her argument to the proposition that the corpus delicti has not been



proven.

The Statute upon which the indictment is based requires the establishment of endeavor to conceal the death of a bastard. It was, therefore, incumbent upon The People in this case to establish the fact that the child in question was illegitimate.

The question of illegitimacy or not, of the child, in any case, is of great public concern. Accordingly it has been long and firmly laid down as a rule of law that any child born during marriage is legally presumed to be legitimate, and illegitimacy must be proven by those who allege it. This legal presumption has been announced in many decisions of courts of appeal, in this State. In Orthwein vs. Thomas, et al., 127 Ill. 554, 561-562, the court said: "and this presumption must prevail until the legal presumption of legitimacy, and which attaches to every child, is overcome by clear and convincing proof; and the burden of showing illegitimacy is, by the law, cast upon those who allege it". Other cases holding similarly are Sugrue vs. Crilley, 329 Ill. 458, 464; Zachmann vs. Zachmann, 201 Ill. 380, 383; Drennan vs. Douglas, 102 Ill. 341, 344-345.

It was incumbent upon The People to prove the impossibility of access of Clifton Monaghan with his wife during the time in question. In The People vs. Dile, Supra, Complainant in the bastardy proceeding testified that she had not seen her husband during the time that conception occurred and stated that another person was the father. Other witnesses there stated that they had not seen the husband in Lawrenceville, Illinois. In emphasizing the necessity of proof as to absence of the husband during the time in question, in the case of The People vs. Dile, at page 24-25, the court said "but their testimony is of such a character as to have little probative value to demonstrate the impossibility of access to his wife during the time in question. No witnesses were called from Hammond to prove such inaccessibility. Hammond is distant seven to nine hours travel from Lawrenceville."

Cairo is distant only about 140 miles from Wood River. The evidence further shows that Clifton Monaghan lived in Cairo; that he had been discharged from the army and was in Wood River. He and his wife corresponded with each other by mail. He sent her a picture of himself in uniform, and the proof indicated that he was in Wood River before May, 1943, when he again went into the army. The People have failed to prove the impossibility of access of Clifton Monaghan. In Robinson vs. Ruprecht, 191 Ill. 424, the court considered a case which is illustrative of the kind of proof that will be adjudged rebuttal of the presumption of legitimacy where it said, at page 432, that, "It appeared in the proof that there was no possibility of access to the mother *** in such state of case the presumption cannot prevail." In The People vs. Gleason, 211 Ill. App. 380, 383, a child was born five days after marriage. It had been conceived several months before the husband and wife had ever seen each other. Accordingly the court said that the presumption that every child born in wedlock is legitimate, was rebuttable when the proof conclusively showed that it was impossible that the husband could have been the father of the child.

In this case, under the peculiar provision of the Statute in question, the corpus delicti is not established until it has been proven that the body found in the shed was a bastard. Such facts cannot be established by the admissions and confessions of the Plaintiff in Error alone. Wistrand vs. The People, 213 Ill. 72; The People vs. Nachowicz, 340 Ill. 480; Gore vs. The People, 162 Ill. 259; The People vs. Hoffman, 381 Ill. 460. Impossibility of access was not established by the proof offered by The People in this case. Except by the statements of the mother of the Plaintiff in Error, at the trial, The People have failed to produce any proof concerning the whereabouts of Clifton Monaghan in January and February of 1943, the time in question. The testimony of the mother would indicate that there was quite a friendly feeling existing at that time between her daughter and son-in-law. Cairo, Illinois,

would be only a few hours travel from Wood River, which fact alone would indicate a clear possibility of access.

We have carefully considered the evidence. It is unsatisfactory and is not of that conclusive character required in a criminal case to justify conviction. On this record, there remains a serious and well founded doubt of proof of Defendant's guilt beyond a reasonable doubt. The People vs. McMahon, 254 Ill. 62, 71; The People vs. Abbate, 349 Ill. 147, 151; The People vs. Kratz, 311 Ill. 118; The People vs. Gold, 361 Ill. 23, 31-32; The People vs. Langaas, 339 Ill. 267.

Accordingly it becomes the duty of this court to reverse the judgment of conviction.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Abstract.

FILED
JUL 7 1945
Clayton B. ...

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
May Term, A.D. 1945.

Agenda No. 5

Term No. 45F6

326 I.A. 512

G. H. FRITCH,
Plaintiff-Appellant,
vs.
LUKE BARNHILL,
Defendant-Appellee.

Appeal from the
Circuit Court of
Saline County.

STONE, J.

This suit was instituted in the Circuit Court of Saline County by G. H. Fritch, Plaintiff-Appellant (hereinafter called plaintiff), against Luke Barnhill, Defendant-Appellee, (hereinafter called defendant) to recover part of the purchase price alleged to have been received by defendant, as agent and broker for plaintiff, for lands sold to one A. C. Wooten, the purchaser.

The complaint alleged that defendant was his agent to sell a certain farm, the property of plaintiff, and that he had collected and received from A. C. Wooten, as a part of the cash payment to be made on the completion of the deal, the sum of Three hundred dollars, (\$300.00) and that defendant had not paid said sum or any part thereof to plaintiff.

Defendant thereafter filed his answer, setting out that he had tendered to plaintiff the sum of \$36.38, in payment of the claim alleged in the complaint, which tender was refused, and that ever since said defendant was ready and willing to pay said sum of money and tendered same into court.

Plaintiff thereupon filed his replication to said answer, admitting the tender and refusal of plaintiff, alleging the refusal to be for the reason that the same was not the full amount demanded

by plaintiff in his complaint.

Following the filing of this replication, plaintiff filed a motion for a judgment on the pleadings, in the sum claimed in his complaint, and as basis of said motion alleged that every material and triable allegation of fact set forth in the pleadings of plaintiff were admitted.

The Court overruled this motion, trial was had, and judgment entered in favor of plaintiff and against defendant for \$36.88, and judgment in favor of defendant and against plaintiff for costs. From the judgment of the court overruling the motion for judgment on the pleadings and the subsequent orders and judgments entered thereafter this appeal is taken.

It is assigned as error that the court erred in overruling the motion of plaintiff for a judgment on the pleadings; in entering judgment in favor of plaintiff and against defendant for \$36.88, and in adjudging the plaintiff to pay the costs of this suit.

It is contended by counsel for plaintiff, that defendant, by failing to make specific denial of any of the allegations set forth in the complaint, admits as true each and every allegation appearing therein; that he admitted the receipt of the money for the purpose stated and that no part of the money so received had been paid, and that he, the defendant sought to defend against an admitted obligation of \$300.00, admittedly wholly unpaid by a tender of only \$36.88, and that therefore the trial court should have sustained plaintiff's motion for a judgment on the pleadings.

From the judgment of the trial court, we can reasonably infer that the court heard evidence sufficient to convince that the difference in amounts had been legally accounted for.

A plea of tender and bringing the money into court is an admission of plaintiff's cause of action to the extent of the amount alleged to have been tendered and brought into court, and dispenses with the necessity for all that proof which plaintiff would otherwise be required to produce in order to recover the amount brought in,

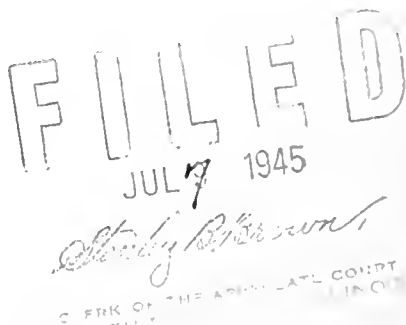
and defendant cannot thereafter object to the form of action or that the action was prematurely brought, so far as the amount so tendered is concerned, but it is not an admission of liability beyond the amount tendered nor does it necessarily admit all of the alleged grounds of recovery. *Mulcahy vs. Melford*, 213 Ill. App. 423. In the instant case, the answer of defendant to the complaint and reply thereto of plaintiff raised the single issue of whether the sum of money due exceeded the amount of the tender. The only question for the court to determine, on the issue so joined was as to the amount of damages. *Frew vs. Illinois Central R. R. Co.*, 57 Ill. App. 42; *Chicago & Great Western Ry. Co. vs. Hogan*, 56 Ill. App. 577. This being so, the trial court did not err in overruling motion for judgment on the pleadings.

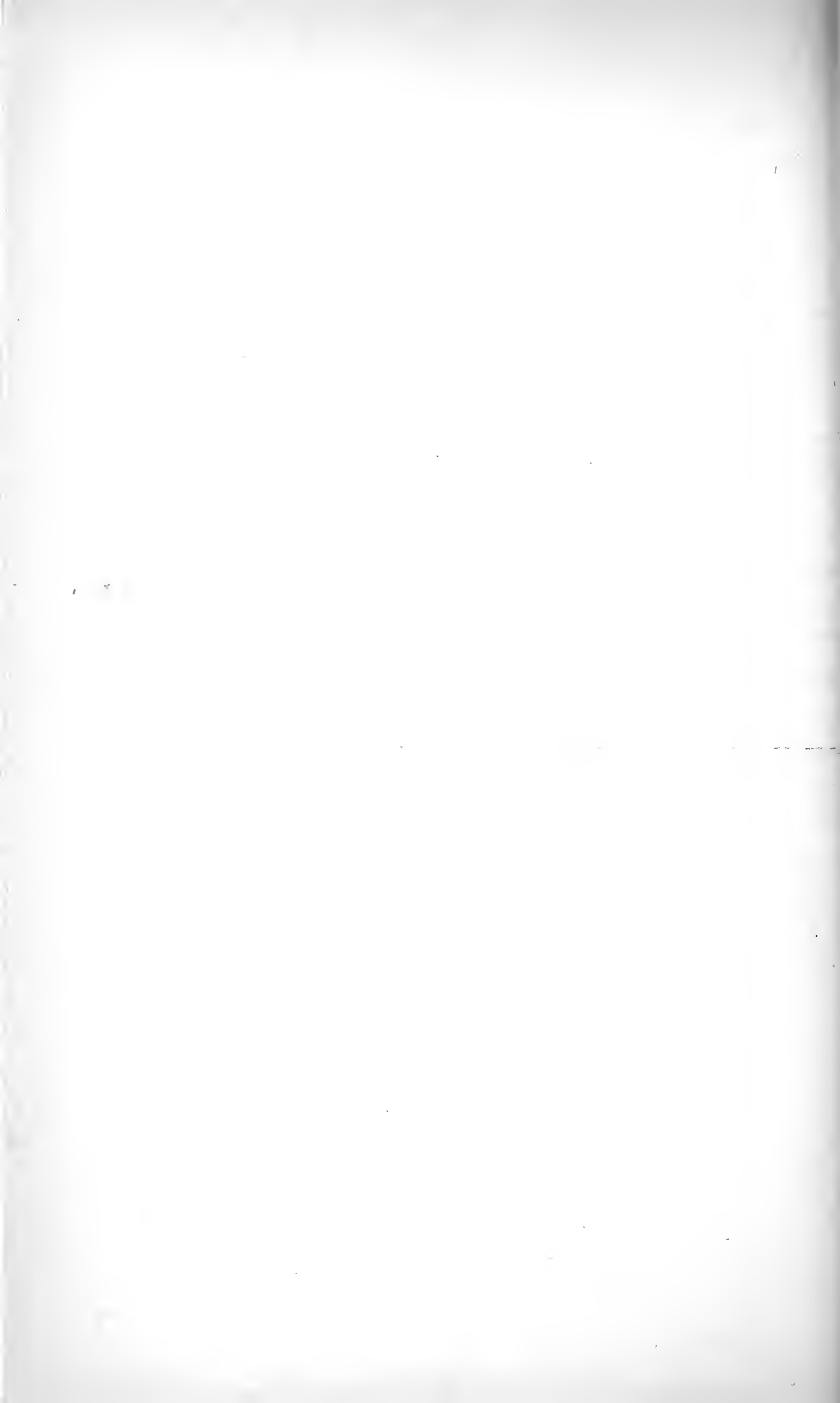
When the issue of tender is found for defendant, the proper practice requires the court to render judgment in favor of defendant for costs. *Frew vs. Illinois Central R. R. Co.* supra; Sect. 3., Chap. 135 Ill. Rev. Stats. 1943.

We believe that the judgment of the trial court was right and the judgment will be affirmed.

AFFIRMED.

Abstract.





STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

May Term, A. D. 1945.

Agenda No. 8.

Term No. 45F7

| | | |
|----------------------|---|--------------------------|
| JENNIE STRONG, |) | |
| Plaintiff-Appellee, |) | Appeal from the City |
| vs. |) | Court of East St. Louis. |
| JOHN W. STRONG, |) | |
| Defendant-Appellant. |) | |

326 I.A. 513

STONE, J.

Jennie Strong, Plaintiff-Appellee, who will be herein-
after designated as plaintiff, filed her suit for separate
maintenance in the City Court of East St. Louis, on September 19,
1944, against John W. Strong, Defendant-Appellant, her husband, who
will be hereinafter designated as defendant. Her complaint
alleged that the parties were married on the 13th day of March,
1944, and separated on or about the 18th day of September, 1944, and
as grounds for her action alleged that defendant struck her on or
about the 9th day of July, 1944, and that on said date and on
various other occasions defendant had been guilty of such conduct
as to make plaintiff's life miserable and intolerable and endanger
her life and her health, necessitating plaintiff's putting herself
under the care of a doctor. A temporary injunction was prayed for
and granted, enjoining defendant, among other things, from coming
on or about the premises where plaintiff resided. The answer filed
by defendant denied the allegations of the complaint.

Upon a hearing the Court entered a decree granting plain-
tiff separate maintenance, from which decree appeal is prosecuted
to this Court. It is alleged among other things as ground for
error, that the Court erred in rendering a decree because the finding

and decree in the case is against the manifest weight of the evidence, and that the Court erred in awarding separate maintenance to plaintiff.

The record discloses that both of the parties hereto had been married before, and that the twenty year old daughter of plaintiff, for a time at least, made her home with them at 1418 Exchange Avenue, East St. Louis, which was the residence of defendant before his marriage to plaintiff. The one act of cruelty alleged in plaintiff's complaint and testified to by her occurred on July 9, 1944, at which time, so she testified, defendant slapped her, and that the thing that led up to that was that she had heard his dead wife's name, morning, noon and night. Defendant admits slapping her on this occasion, and claims that there was some provocation for that, inasmuch as plaintiff and "called me a name involving my mother's character". In rebuttal, the plaintiff testified that she called him a name, after she was struck, and not before. However, they both testify that they were reconciled after this incident, and plaintiff testified that they lived together as husband and wife until on or about September 18th, 1944, shortly before the separation. The record discloses no other act of physical violence or threat of violence on the part of defendant after July 9th.

It would seem reasonable to believe that the logical time for plaintiff to have separated from defendant, if, as she alleged in her complaint, her life was endangered, was immediately after the act of July 9th. But this was condoned and there was no subsequent act to renew it.

Plaintiff testified that one night "he was kissing me like any other married couple does when they go to bed. Instead of having natural intercourse, he got down with his mouth before I knew what was happening * * he just leaned over there and put his mouth on it * * on my vagina." She further testified that since that time he had asked her to do the same thing. This was denied in its

entirety by defendant. Counsel for plaintiff designate this as sodomy and claims that this would constitute a second act of cruelty upon the part of defendant. Chap. 39, Sec. 141, Ill. Rev. Stat. 1943, defines sodomy as the infamous crime against nature, either man or beast. Dr. Krafft-Ebing, authority on sex perversions describes bestiality (connection with animals) and pederasty, under the general term of sodomy and points out that the original meaning of sodomy used in Genesis (Chapter 19) signified pederasty, i.e. anal coitus between men.

Plaintiff claims, by inference at least, that this alleged act on the part of defendant brought on a nervous collapse, and that she was under the care of a physician for a month and that thereafter she was under the care of a chiropractor. Neither the physician nor the chiropractor testified in this case, for the purpose of showing any connection between any act on the part of defendant and the alleged physical condition of plaintiff. If the plaintiff was horrified by the alleged exhibition of unnatural sexual desires on the part of defendant, it was not apparent in the subsequent life of the parties. Thereafter and up until shortly before their separation, they ate at the same table, attended the theatre together and lived and cohabited as husband and wife.

The circumstances attendant upon the separation of the parties, is not as clearly outlined by the record as might be. Plaintiff's testimony is to the effect that defendant told her to get out several times. It is evident that she did not do so, but continued to live in the same house with defendant. The injunction allowed by the court enjoined defendant from coming on or about the premises where plaintiff resided, so it may be inferred that he left the premises where he had lived before he married plaintiff, not of his own volition, but because of the order of court.

We believe it significant that defendant testified that the Monday before plaintiff filed suit, she said to him that she wanted a final answer about the matter of making the bank account



a joint one, and that she said then that she was going to sue for divorce. She admits this in substance.

The record as a whole indicates that defendant was a man of sobriety, good habits, providing well for his wife, during the time that they lived together. He provided her with a comfortable home and the use of an automobile. There is some evidence that he cursed, but not that he cursed at plaintiff.

Plaintiff's daughter, who made her home with the parties litigant part of the time, was called as a witness on behalf of plaintiff and did not testify to a single act of misconduct on the part of defendant. Mrs. Ema Roney, a neighbor and friend of plaintiff for fifteen years was called as a witness for plaintiff, and her testimony was to the effect that she had been in their home hundreds of times, but saw or heard no misconduct on the part of defendant.

We realize that a reviewing court would have no right to disturb the findings of the chancellor who has heard the witnesses in open court and has seen them upon the witness stand, unless it can be said that the finding of the trial court is manifestly against the weight of the evidence. *People ex rel Hirsch vs. Nagel*, 243 Ill. App. 490; *Stephens-Adamson Mfg. Co. vs. Fireman's Fund Ins. Co.* 257 Ill. App. 443; *Wear Proof Mat. Co. vs. Bastian-Morley Co.* 268 Ill. App. 455. It has been held repeatedly in Illinois that incompatibility of disposition, slight moral obliquities, occasional exhibitions of passion, trivial difficulties, are not good cause for living apart. *French vs. French*, 302 Ill. 152; *Wahle vs. Wahle*, 71 Ill. 510; *Johnson vs. Johnson*, 125 Ill. 510; *Hellrung vs. Hellrung*, 321 Ill. App. 33.

Good cause for living separate and apart from her husband must be such conduct on the part of the husband as will directly endanger the life of the wife, her health, or person, or such course of conduct as will necessarily and inevitably render her life miserable and living with him as his wife unendurable. *Jackman vs.*

Jackman 213 Ill. App. 329; Johnson vs. Johnson, supra; French vs. French, supra; Hellrung vs. Hellrung, supra.

We are inclined to the belief that no one single act or combination of acts, taking into consideration subsequent condonations, on this record, would justify a decree for separate maintenance. In Deenis vs. Deenis, 65 Ill. 169, the Court said "Even in an application for divorce, where good ground once existed for a decree, condonation is an absolute bar to any remedy for the particular injury which has been forgiven. This principle applies as well to the case before us. The separation on the part of the wife must be 'without her fault'. If he has committed an offense which is forgiven, the offense no longer exists, and there can be no cause for the separation."

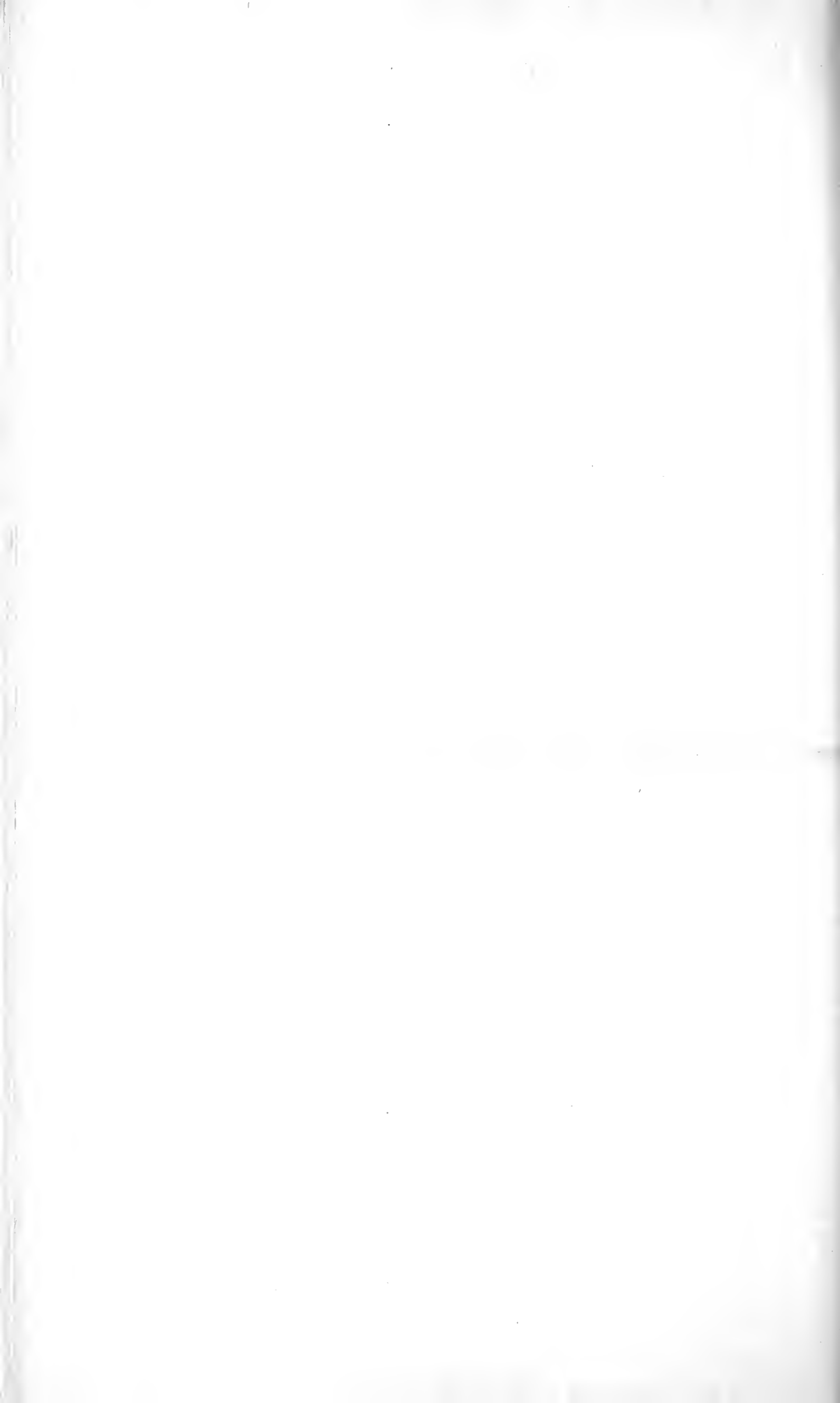
The view we take of the main question in the case makes it unnecessary for us to consider or discuss the other questions assigned as error.

For the reasons given the decree is reversed and the cause remanded with directions to dismiss the complaint for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

Abstract.

FILED
JUL 7 1945
Stanley R. Brown
CLERK OF THE APPellate COURT
NORTH DAKOTA



Abstract

Gen. No. 10,010.

Agenda No. 8.

326 I.A. 514

In the Appellate Court of the
State of Illinois

Second District
February Term, A.D. 1945.

People of the State of Illinois, :
Defendant in Error, : Writ of Error to the
v. : County Court of
Merle Hoffman, : Livingston County
Plaintiff in Error. :

Dove, P.J.:

Plaintiff in error, hereinafter for convenience called defendant, was convicted in the county court of Livingston County, of larceny of an air gauge used in testing the air pressure in automobile tires. The information charged that on August 28, 1944, the accused did steal, take and carry away 1 Schrader Service Gauge of the value of \$3.10, the personal goods and property of Elmer Stahl. A jury trial was waived by defendant, and the trial was by the court without a jury. Motions for a new trial and in arrest of judgment were overruled, and the cause is here on writ of error.

It is first urged that the court erred in overruling the motion for a new trial, on the grounds that the People failed to prove the defendant guilty beyond a reasonable doubt, and that the evidence preponderates in favor of the defendant. The proofs show that he is an experienced auto-

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It is first urged that the court should in overruling the motion for a new trial, do this merely with the people failed to prove the defendant guilty beyond a reasonable doubt, and that the evidence preponderates in favor of the defendant. The proofs show that he is an experienced auto-

mobile mechanic, and operates a garage and filling station at Dana. The complaining witness, Elmer Stahl, operates a filling station at Cornell, about eleven or twelve miles east of Dana. Each of them had a Schrader service gauge of the same type and price. Mr. Stahl purchased his on October 30, 1943, and defendant purchased his on May 17, 1944, from different Chicago dealers. They cost \$3.10 each.

The uncontradicted evidence shows that on about August 18, 1944, Leslie Syphers, a truck driver, who had formerly worked at defendant's garage, borrowed defendant's air gauge and took it to the Woltzen garage, about one half block away, where there was no gauge that would test truck tires, and, after using it, laid it on the window sill outside the garage, and forgot it. About five or ten minutes afterwards, when he returned to get the gauge, it was gone, and he informed defendant about it, offering to pay for the gauge. A few days thereafter, while driving through Cornell, Syphers stopped at the Stahl filling station to fill a front tire on his truck. He testified that Mr. Stahl handed him defendant's air gauge, and that he recognized it by a peculiar crack, and by two identification marks used by defendant to mark his tools; that he said nothing to Mr. Stahl about the gauge belonging to defendant, but, upon reaching home, reported the finding of it to defendant. A few days thereafter, on August 28, 1944, defendant drove to the Stahl filling station, and upon inquiring of Mrs. Stahl for a tire gauge, was handed one by her. He thereupon claimed it was his, a dispute as to its ownership ensued with her and Mr. Stahl, and defendant took the gauge away with him. He testified that he asked Mrs. Stahl where they got the gauge, and that she said they bought it in Chicago for \$2.00; that he asked her to show him some identification

of the gauge, but that "she didn't seem to answer, she was so nervous": that they did not show him any identification of the gauge, and that he stated that he was going to take his own property; that he showed them the mark, and laid the gauge down on the counter, behind which Mrs. Stahl stood, and that he laid it down right in front of her.

Mr. Stahl testified that defendant did not exhibit any identification mark, but "covered it right up", and kept it in his hand so that they could not see it at all. Mrs. Stahl testified that while defendant held the gauge in his hand, he said; "Those are my initials", and that he would take the gauge. Defendant left his name and address, written on a piece of paper, with the Stahls.

A peculiar circumstance is that, on the trial, when the State's attorney showed the witness, Mr. Stahl, the gauge with the crack and the identification marks, which was obtained from the sheriff, he testified that it was not the gauge which he had bought and which was taken from his place of business; that his gauge was of the same type and number, but had nickel on it, all over, unless there might be some worn off the handle, and that he saw no nickel on the gauge then shown him. His wife testified substantially the same way. Other witnesses testified that the gauge exhibited on the trial was not the one Mr. Stahl had.

Defendant testified that the gauge produced on the trial was the one he took away from the Stahl filling station, and that it was the one he had bought and loaned to the truck driver. He and the truck driver identified it by the crack and the markings, and the evidence of several witnesses shows that the defendant marked his tools in the manner shown by the marks on the gauge produced in court. The People did not offer the gauge in evidence, and it was offered by the defendant. It appears from the evidence that Mr. Stahl and defendant each had only on

gauge of the kind in controversy. No other gauge than the one produced in court was found in the possession of defendant. The testimony of Mrs. Stahl that he said: "Those are my initials", strongly tends to refute the testimony of her husband that defendant was concealing the gauge, and imports that he did exhibit the markings. The truck driver testified positively that he saw the gauge at the Stahl filling station a few days previously.

A logical inference from all the testimony is that the party who took defendant's gauge from the window sill of the Woltzen garage, surreptitiously substituted it at the Stahl filling station for the gauge belonging to Mr. Stahl, in order to cover his speculation, and that the Stahls did not notice the substitution. Nothing in the People's testimony lessens this inference. There is no question but what the gauge produced in court belongs to defendant, and it was obtained from the sheriff. The weight of the testimony shows that it is the gauge which defendant took from the Stahl filling station. While, on disputed questions of fact, much weight is to be given to the findings of a jury, or of a trial judge, that rule does not prohibit the reversal of a judgment which is manifestly against the weight of the evidence. Our conclusion is that the People failed to prove the defendant guilty beyond a reasonable doubt.

Moreover, it is fundamental that in order to constitute the crime of larceny, there must be a felonious intent, and a union of act and intent. While sometimes an intent may be inferred from the act, the circumstances in evidence in this case are not such as to raise the element of intent from the act of the defendant, and we find that proof of the element of intent is wholly lacking here. Defendant went to the Stahl filling station in broad daylight, claimed the gauge as his own, from the crack and the markings thereon, and the

testimony of Mrs. Stahl corroborates his testimony that he exhibited the markings. Leaving his name and address with them also negatives the intent necessary to constitute the offense charged.

The trial court erred in denying the motion for a new trial on the grounds mentioned. Because of this, it is unnecessary to discuss any of the other grounds urged for reversal. The judgment is reversed and the cause is remanded.

Reversed and remanded.

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Abstract

Gen. No. 10024

Agenda No. 17

In the Appellate Court of the
State of Illinois

Second District
February Term, A.D. 1945

Agnes La Prise, Administrator of
the Estate of Harold La Prise,
Deceased,

Appellant,

v.

Carr-Leasing, Inc., a Corporation,
Frank-McCrory and John Rehak,
Appellees.

Appeal from the
Circuit Court of
DuPage County

Dove, P. J. -

Appellant's intestate was found dead at about 8:30 o'clock, A.M., on October 21, 1945, about five feet off of the south side of the graveled portion of Warren Avenue in the Village of Downers Grove, about one-half block east of its intersection with Woodward Avenue. Appellant instituted suit in the circuit court of DuPage County against appellees to recover damages on account of his death, alleging that while the decedent was walking easterly on Warren Avenue, he was struck and killed by a certain motor vehicle, commonly known as a taxi-cab, owned by Carr-Leasing, Inc., and Frank McCrory, and being driven easterly by their servant, John Rehak.

The complaint also alleged due care and caution on the part of the decedent, with allegations of negligence of the defendants in one or more of the following acts; in driving, management and control of the motor vehicle; failure to keep a proper and sufficient lookout for persons on the highway; failure to give warning of the approach of the motor vehicle, in violation of section 115 of the Uniform Motor Vehicle act; and a rate of speed greater than was reasonable and proper,

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THE UNITED STATES OF AMERICA

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having regard to the traffic and the use of the highway. Except an admission by Carr-Leasing, Inc., that it was the owner of a certain motor vehicle, commonly known as a taxi-cab, issue was joined on all the other material allegations of the complaint. The answer of Carr-Leasing, Inc., was amended to read: "Car-Leasing, Inc.", the suit was dismissed as to Frank McCrary before the trial, and at the close of the plaintiff's case the court sustained motions of the two remaining defendants for a directed verdict in their favor, a verdict was returned accordingly, judgment was entered thereon, and this appeal followed.

The grounds urged for reversal are that the court erred in sustaining objections to the offer in evidence of a map of the streets of Downers Grove, and to the offer of a picture of the body of the decedent taken before it was moved on the morning in question; in not admitting in evidence a picture of the taxi-cab as it appeared on the afternoon of that day; in permitting re-examination or cross-examination of John Revak by his own counsel at the close of his examination under section 60 of the Civil Practice Act; in permitting the re-examination and cross-examination to go beyond the examination; in giving the instructions directing a verdict for the defendants; in entering judgment on the verdict; and in overruling appellant's motion for a new trial.

The map of the streets of the Village was denied admission on the ground that it was not helpful and was likely to confuse the jury, that nothing was shown on the plat that could not readily be shown by testimony, and that much appeared thereon that had nothing to do with the case. The testimony of the witnesses discloses in detail the streets involved on every material phase of the issues, the directions in which

they run, their situation with respect to each other, the names of the streets, distances and directions shown to have been traveled by the taxi-cab, the locations of the residences of the parties involved, the objectives of the parties, and everything necessary to a full understanding of the issues. Admitting the map in evidence would not have thrown any light on any controverted point not shown by the testimony of the witnesses. Under such circumstances, there was no error in refusing to admit the map in evidence. (Schneider v. North Chicago Street Railroad Co., 80 Ill. ^{app.} 306, 309: 32 C.J.S. Sec. 709, p. 612.)

After the chief of police of the Village had testified in detail to the position of the body shortly after it was found, with the head to the east, the nose in the dirt, the position of the decedent's dinner pail, his cap and some papers, the photograph of the body was offered in evidence and denied admission. None of the testimony of the witness was contradicted, and the photograph could have served no useful purpose. It obviously might tend to inflame and prejudice the jury, and there was no error in refusing to admit it in evidence. (Wigmore on Evidence, Vol. 2. secs. 1156, 1158, pages 1352, 1355; Louisville and Nashville Railroad Co. v. Pearson, 97 Ala. 211, 219, 12 So. 176; Selleck v. City of Janesville, 104 Wis. 307, 80 N. W. 944.)

As to the failure of the court to admit the photograph of the taxi-cab in evidence, the record shows that at the time it was offered and objected to, the court states that he would reserve his ruling "for the present", and appellant did not thereafter request the court to pass upon her offer. Without a ruling of the court there is nothing in the record on this point for us to consider.

John Rehak was called as an adverse witness by appell-

ant under Section 60 of the Civil Practice act. At the close of his examination by appellant's counsel, it was proper to permit his own counsel to examine him as to all matters relative to which he had been interrogated by appellant's counsel. (Combs v. Younge, 281 Ill. App. 339, 348; Kubin v. Chicago Title and Trust Co., 307 id. 12, 19; Branch v. Woulfe, 300 id. 472, 478; Blumb v. Getz, 294 id. 432, 438.) No place in the record or abstract is pointed out or referred to by appellant where the examination of Rehak's counsel went outside the scope of his examination by appellant's counsel, and under the well settled law this court will not explore the record to find some ground for reversal. Moreover, from our examination of the testimony to determine whether the court properly directed a verdict, we find no ground for such a claim.

The remaining question is whether the court erred in directing a verdict for the defendants, which necessitates an examination of the evidence. The testimony shows that the Chicago, Burlington and Quincy railroad runs east and west through Downers Grove. Among the north and south streets, in the neighborhood involved, in their order from east to west are Main Street, Forest, Oakwood, Carpenter, Lee, Cornell, Stonewall, Woodward and Belmont road. The first street east of Belmont Road which crosses the railroad is Forest, and the next one is Main Street. South of the railroad, some of the intersecting east and west streets, in their order from north to south, are Burlington, Curtiss, Chicago Avenue, Prairie, Warren, Franklin, Junior Court, Elmar, Howard and Maple. There is some inconsequential confusion in the testimony of Mr. Rehak as to whether Warren is north or south of Franklin, but his testimony shows there is no intersecting street between Warren and Prarie, and that in going north on Lee, it is necessary to

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pass Warren and go on north to Prairie before turning east. The office and parking lot of the taxi-cab company are at Main Street, between the railroad and Burlington street.

It appears from the testimony of appellant, who is the widow of the decedent, that they and their three children lived on the east side of Belmont Road, some distance south of the railroad; that the decedent was employed at the Chicago post office, and was in the habit of boarding the 5:22 A.M. train for Chicago at the Belmont Road station each morning; that when he missed the train he would walk to the main portion of Downers Grove, the closest way being by Warren Avenue (the street where his body was found); that he left home on the morning in question at about the usual time; and that about fifteen minutes after he left, she heard a car racing down Belmont Avenue going north.

John Rehak lived on Belmont Road in the second house south of Maple, about one-half mile south of the LaPrise residence, and about one mile south of the railroad. He testified that he was employed by "DuPage Yellow Cab"; that there were four drivers, who took turns on the night shift; that on the evening of October 20th, he went on duty at 5 o'clock, P.M., and worked until 2 o'clock, A. M. the following morning, and then, after delivering some passengers from the 2 o'clock, A. M. train, went home, having a call to pick up Mrs. Marie Perkins at 5:30 A.M. Mrs. Perkins lived at 4813 Oakwood, about three-fourths of a block north of Franklin, and was in the habit of going early each morning by taxi-cab to the school where she was employed on Forest, between Burlington and Curtiss, about 8 1/2 blocks north and east of her home. Mr. Rehak testified that he left home about 5:15 A.M. and that it was dark; that from his home he drove north on Belmont Road to

Maple, east on Maple to Carpenter, north on Carpenter to Curtiss, north on Curtiss to Burlington, east on Burlington to Main Street and turned into the parking lot, which was the shortest and most direct route from his home to the cab office; that the office was left unlocked and there was a pad and pencil for customers to leave orders; that he stayed only long enough to see if any slips were posted for calls, and to unlock the money box, and then left for the Perkins home, traveling south on Forest to Prairie, and from Prairie south on Oakwood, to the Perkins home, turned into the driveway, and found her waiting. The record shows that over these routes, the distance from the Rehak home to the cab office is two miles, and from the cab office to the Perkins home is seven-tenths of a mile. Mrs. Perkins testified that on the trip to the school they went north on Oakwood to Chicago Avenue, east to Forest, and north on Forest to the school, arriving at 20 minutes before six o'clock, as shown by the electric clock at the entrance which was a little earlier than her usual time of arrival. Mr. Rehak testified that from there he went to Westmont to pick up one of the drivers living north of the railroad on Washington Street, and drive him back to the taxi-cab office, arriving at about ten minutes before six o'clock; That Mrs. Perkins was the first person that he saw that morning after leaving home, and that he was not on Warren Avenue from the time he left home until he picked up Mrs. Perkins.

Fred Edwards testified that on the morning in question, he was going home from work and reached the intersection of Warren and Cornell at 5:20 A.M., fixing the time by a clock in a gas station; that as he turned the corner, going north on Cornell, he heard a kind of thud, and looking west saw the head-lights of a car a couple of blocks west, and that it

looked to him as though it had stopped; that the lights flickered and the car then came on east and passed the corner when he was about one-half block north; and that he heard it stop after it passed Cornell. He did not attempt to identify the car as a taxi-cab or as the one driven by Mr. Rehak.

The chief of police testified that he examined the taxi-cab driven by Mr. Rehak, at about 2:50 P.M. that day; that there was a dent in the top of the right fender, about 8 inches wide, ten inches long, and possibly 1 1/2 inches deep at the deepest part, with no paint knocked off; a dent in the right side of the hood, the right side of the cowl dented down, and the right half of the wind-shield cracked, with three lines from an impact, starting at the bottom and flared toward the top. Mr. Rehak testified that when he left home that morning, and when he left the car in the parking lot, there were no cracks in the windshield, and no dent in the right fender, the cowl or the hood; and that he left the keys in the car that morning. Mrs. Perkins testified that she sat on the right hand side of the taxi-cab, in the rear, and did not notice any windshield that was cracked or shattered, nor anything unusual about Mr. Rehak's appearance or condition; that he did not appear excited or nervous, and that she did not notice anything out of the ordinary that morning, and did not observe the windshield at all.

The physician who examined the body of the decedent at about 8:45 A.M. that morning, testified that he examined it all over with the clothes off, for fractures, bruises and anything that he could find, and found no bruises, and no fracture except a compound fracture of the left leg midway between the knee and the ankle, and found no other injuries; that the examination was fairly thorough, and that in his opinion the

decedent died from shock and exposure, with possible suffocation from his nose being buried in the ground; that rigor mortis had set in, and that he figured that the decedent had been dead about two or three hours.

Under a motion by a defendant for a directed verdict, the court does not weigh the evidence, or determine its preponderance, but the sole question presented by the motion is whether the evidence, with all reasonable inferences to be drawn therefrom, fairly tends to prove the charges in the complaint. (*Bartolucci v. Falletti*, 582 Ill. 168, 173.) In the case at bar, appellant's case against Car-Leasing, Inc., is based on the doctrine of respondeat superior, and in order to make a case against that corporation, it was incumbent upon her to establish that the relation of master and servant existed between it and Mr. Rehak. She made no such proof, and Mr. Rehak testified that he was employed by "DuPage Yellow Cab", and there is no testimony in the record which tends to identify DuPage Yellow Cab with Car-Leasing, Inc.

Furthermore, there is a fatal defect in appellant's case, in that there is no proof that shows or tends to show that he was in the exercise of ordinary care for his own safety at or before the time he was killed, and there is no proof that he was a man of careful habits, and no testimony on either of these points was offered. Under these circumstances, it is unnecessary for us to discuss whether the testimony on the other issues was sufficient to require submitting the issues on those points to the jury.

Such tragedies as the death in this case are deplorable, and excite the sympathy of everybody, but, under the settled rules of law, in order to recover damages in such a case, the plaintiff must establish his cause of action by prov-

ing the necessary facts, or by proving facts from which the charges may reasonably be inferred. Because of the fatal omissions in the testimony, above mentioned, the trial court correctly granted the motions for a directed verdict, and the judgment is affirmed.

Judgment affirmed.

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Abstract

General ^{No.} number 9451.

Agenda number 3.

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT
FEBRUARY TERM, A. D. 1945

MARIE E. SULLIVAN and
PERCY B. SULLIVAN,

Plaintiffs-Appellees,

-vs-

HENRY H. MOREY,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT
OF MACON COUNTY.

328 I.A. 553

~~HONORABLE C. Y. MILLER,~~
~~Judge Presiding.~~

HAYES, J.:

Plaintiffs Percy B. Sullivan and Marie E. Sullivan brought suit in the Circuit Court of Macon County to cancel certain notes and mortgage given by them to the defendant, Henry Morey. The trial court entered a decree in favor of the plaintiffs and Morey has appealed to this Court.

Morey, an attorney at law, represented Percy Sullivan in numerous transactions over a period of years. In 1928 he was associated with another attorney in a successful defense of Sullivan in a criminal case in Piatt County and was equally successful in securing the dismissal of a related civil suit against Sullivan. Morey testified that he was not paid for these services. On April 2, 1928 Sullivan sold Morey a note of one Harvey Morrell of the face amount of \$685.00. Suit was brought on this note by Morey in the Circuit Court of Cook County which held the note to be void. On March 6, 1930 Sullivan

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April 7, 1922 affirmed the decision of the District Court.

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was indicted for confidence game in Livingston County and asked Morey to represent him. The latter made three trips to Pontiac, Illinois with Sullivan to negotiate with the State's Attorney there about a bail bond before surrendering Sullivan. A surety Company bond was demanded and Morey hypothecated certain federal bonds owned by him to indemnify the surety company in order to obtain the bail bond. About two days later Morey asked the Sullivans to sign a note for \$3000.00 and a mortgage on a subdivision owned by Mrs. Sullivan. On March 14, 1930 the note and mortgage were executed by the Sullivans. They contend that these instruments were given to indemnify Morey, should his bonds be forfeited. Morey testified that they were intended to evidence Sullivan's indebtedness to him for past legal services, for rent, for the use of his bonds and for fees to be incurred in Sullivan's defense in Livingston County. The indictment in Livingston County was dismissed at Morey's behest as was a subsequent one for the same offense. A conviction on a third indictment was set aside in the Appellate Court on an appeal in which Morey also participated. At the conclusion of these proceedings Morey's bonds were returned to him by the surety company.

On July 25, 1930 while the criminal proceedings in Livingston County were pending, Morey secured another note from Sullivan for \$1200.00. At the time of its execution the Sullivans signed a memorandum prepared by Morey stating that the note was given to Morey to reimburse him for the face amount of the Morrell note, trial expenses in the suit thereon, money advanced by Morey to pay taxes on property owned by the Sullivans and \$150.00 thereafter paid to the Sullivans. The latter contend that they signed this note

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and the memorandum under duress upon representations from Morey that he would withdraw from the pending criminal case and secure the return of his Federal bonds.

In March, 1941, Morey told the Sullivans that they would have to extend the maturity date of the \$3000.00 note or he would have judgment entered upon it. The Sullivans thereupon endorsed an extension agreement on the note to June 15, 1942. On April 13, 1942, a \$50.00 payment was credited on the \$1200.00 note by Morey. Sullivan claims that he directed Morey to apply this payment to another note of Sullivan's held by Morey but the latter denies this, stating that Sullivan directed him to credit the payment to the \$1200.00 note.

The Circuit Court of Macon County found that an attorney-client relationship existed between the parties and that Morey failed to establish that he dealt with fairness and equity with the Sullivans. It further found that Morey had failed to prove that the notes and mortgage in question were valid obligations of the Sullivans and in addition that the \$1200.00 note was barred by the Statute of Limitations. It therefore ordered the cancellation of the notes and mortgage.

It is clear that an attorney-client relationship existed between Morey and the Sullivans at the time the \$1200.00 note was executed. Because of this the burden of proof rested upon Morey to show that the consideration for the note was fair and adequate. *Ankrom vs. Doss*, 270 Ill. App. 464. We believe that Morey has fulfilled this requirement. Sullivan claims that the major portion of the alleged consideration for this note was the repayment of the loss sustained by Morey in connection with the

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Morrell note. The endorsement on that note provided:

"For value received we hereby transfer and assign all our right, title and interest in this note to _____ The Standard Light Co. by P. B. Sullivan." This, Sullivan contends is a qualified endorsement which does not include the usual warranties and he cites our decision in Ellsworth vs. Varney, 83 Ill. App. 94. That case was decided in 1898; in 1907 our Negotiable Instruments Act was passed, Section 31 of which (Ill. Rev. Stat. 1943, Chapter 98, Par. 51) provides in part; "The signature of the indorser, without additional words, is a sufficient indorsement and the addition of words of assignment or of guaranty shall not negative the additional effect of the signature as an indorsement unless otherwise expressly stated." Section 38 (Ill. Rev. Stat. 1943, Par. 58) provides: "A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse' or any words of similar import." Without deciding the question, we believe that in view of these provisions of the Statute, there is a question as to whether our decision in the Varney case now correctly states the law. It is sufficient to state here that a bona fide ground for dispute existed over the liability of Sullivan as an unqualified endorser and this disputed liability can properly be considered as part of the consideration for the \$1200.00 note. Adams vs. Crown Coal & Tow Co. 198 Ill. 445; Greer-Wilkinson Lumber Co. vs. Neeves, 184 Ill. App. 575; Smith vs. McLennan, 101 Ill. App. 196. The Sullivans also contend that they signed the note under duress. The

record however fails to sustain this charge. While Morey

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may have used pressure to obtain his end, that in itself does not constitute duress. Farmers National Bank of Princeton vs. Rosenkrans, 240 Ill. App. 230. Sullivan was a man of considerable business experience and especially aware of the sharp practices that often occur in the business world. We do not believe that any advantage was taken of him. The mere threat on Morey's part to withdraw from the defense of a criminal prosecution, and to withdraw the Federal Land Bank Bonds that he had furnished in order to obtain a bail bond for Sullivan, unless he was then secured or reimbursed for the loss that he had on the Morrell note and for money advanced to the Sullivans, is not as a matter of law the basis for duress so as to nullify a written promissory note. We therefore believe that the Circuit Court erred in finding that Morey failed to prove that the \$1200.00 note was supported by fair and adequate consideration.

The trial court also found that the \$1200.00 note was barred by the Statute of Limitations. It is implicit in this finding that the Court believed Sullivan's statement that he did not intend his fifty dollar payment of April 13, 1942 to be credited on this note. The evidence is conflicting on this point and since the chancellor's finding is not contrary to the weight of the evidence we believe that as far as the facts are concerned his finding in this respect must be sustained. We do not agree, however, that the Statute of Limitations should prevent Morey from collecting anything on his debt. A chancellor must always be guided by the maxim that he who seeks equity must do equity. The Sullivans, in their complaint, offered to make restitution to Morey of such amount as the Court should deem just. We believe they should be required

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to do so. The grafting of such a condition upon a decree cancelling evidence of an indebtedness is well within the power of the chancellor. DeWalsh vs. Braman, 160 Ill. 415.

The Circuit Court also found that an attorney-client relationship existed at the time the \$3000.00 note and mortgage was executed and that Morey had not sustained the resulting burden of proving that there was a fair and adequate consideration for them. We do not believe a determination of this issue to be important. In our judgment the only question is what actually was the consideration for the note and mortgage. Sullivan contends that these instruments were executed to indemnify Morey for any loss he might sustain by hypothecating his bonds with the surety company. He so testified and he is corroborated in this by the testimony of two of his employees who were present during certain conversations between Sullivan and Morey. Morey claims, on the contrary, that these instruments were to secure him for unpaid legal fees for services already performed and for fees to be incurred in the criminal proceedings in Livingston County. Regardless of where the burden of proof lay, we believe that it was incumbent upon Morey to produce some evidence in addition to his own statement to meet the testimony of Sullivan and his witnesses. This he could have done by showing that the face amount of the note bore some relation to the value of the services performed by him. The record is barren of any evidence of this character except for statements by Morey of the results obtained by his efforts. In fact, Morey, on cross examination evaded answering what amounts he had charged Sullivan for his services. Under these circumstances we think the weight of the evidence supports Sullivan's

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contention and that upon the return of Morey's bonds to him, the consideration for the \$3,000.00 note and mortgage failed. We believe the chancellor correctly ordered both instruments surrendered and cancelled.

The decree of the Circuit Court of Macon County is therefore reversed and the cause remanded to that court with directions to make an accounting between the parties on the twelve hundred dollar note and to find the sum due the defendant thereon. The Court is further directed to modify the decree in this cause to provide that the three thousand dollar note and mortgage shall be surrendered and cancelled upon the payment of the sum found due on said twelve hundred dollar note.

DECREE REVERSED. CAUSE REMANDED WITH DIRECTIONS.

On the 1st of January 1900, the British
 Government, in accordance with the
 provisions of the Act of 1897, transferred
 the administration of the Colony of
 New Guinea to the British Government.
 The Colony of New Guinea, which
 had been administered by the
 British Government since 1888, was
 transferred to the British Government
 on the 1st of January 1900. The
 British Government, in accordance
 with the provisions of the Act of
 1897, transferred the administration
 of the Colony of New Guinea to
 the British Government on the 1st
 of January 1900. The British
 Government, in accordance with the
 provisions of the Act of 1897,
 transferred the administration of
 the Colony of New Guinea to the
 British Government on the 1st of
 January 1900.

43416

PETER CHAPRALIS, et al.,
Appellants,

v.

CITY OF CHICAGO, a Municipal
Corporation,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

326 L.A. 554

PRESIDING
MR./JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The facts in this case are not disputed. February 1, 1921, the City of Chicago filed a condemnation petition in the Circuit Court of Cook County, Case No. B-71144, to acquire property for the purpose of widening North Ashland Avenue from Lake Street to Irving Park Boulevard, in conformity with the provisions of the Local Improvement Act of 1897. The property to be acquired was owned by plaintiffs in this case and other persons made defendants. Awards were rendered in favor of each defendant entitled, and on July 26, 1927, the City of Chicago caused a final and unconditional judgment on each award to be entered in favor of each of the property owners. Plaintiffs in this litigation are defendants named in the condemnation suit. The amounts of judgments respectively entered in their favor appear in appropriate pages of the record. The record also shows that the principal amounts of these judgments, as listed, were paid by the City of Chicago during the years 1929, 1930 and 1931.

The procedure used in paying the judgments was, the City of Chicago caused a warrant to issue for the amount of the judgment, the warrant providing that it was issued "for the amount of compensation awarded that part of (reciting legal description),

PETER J. CHAPMAN, et al.,
Appellants,

v.

CITY OF CHICAGO, a municipal
corporation,
Appellee.

PRESENTING

MR. JUSTICE

The facts in this case are not in dispute. In 1921, the City of Chicago filed a condemnation petition in the Circuit Court of Cook County, Illinois, to acquire property for the purpose of acquiring West Jackson Avenue from Lake Street to Irving Park Avenue, in conformity with the provision of the Local Improvement Act of 1917. The property to be acquired was owned by plaintiff in this case and other persons made defendants. A writ of habeas corpus was issued in favor of the defendant entitled, and on July 26, 1927, the City of Chicago caused a final and unconditional judgment on the writ to be entered in favor of each of the property owners. Plaintiff in this litigation are defendants named in the condemnation petition. The amounts of judgments respectively entered in their favor appear in appropriate pages of the record. The record also shows that the principal amounts of these judgments, as listed, were paid by the City of Chicago during the years 1924, 1925 and 1926. The procedure used in paying the judgments was, the City of Chicago caused a warrant to issue for the amount of the judgment, the warrant providing that it was issued "for the amount of compensation awarded that part of (setting legal description),"

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said land having been condemned for the opening and widening of North Ashland Avenue from Irving Park Boulevard to West Lake Street, being in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings". On the back of this voucher was a receipt signed by the property owner or his agent, similar to Exhibits 3 and 5 which appear in the record reciting: "Received of the City of Chicago in full payment of the within account". In payment of some of the judgments this form of voucher was used: "For balance of compensation awarded that part of (legal description), said land having been condemned for opening and widening North Ashland Avenue between Irving Park Boulevard and West Lake Street, being in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings". On the back of this voucher appears: "Received of the City of Chicago full payment of the within account". This voucher was signed either by the property owner or his agent, as appears from exhibits in the record. On the face of each voucher were the words: "The amount of this voucher is in accordance with the judgment of the court, and funds are available in this warrant to pay this voucher".

When the voucher had been issued and receipted by the property owner or his agent, the City of Chicago issued its check for the amount of the voucher. The check in each and every instance was made payable to the order of the property owner, as shown by exhibits in evidence. The back of each check bears the endorsement of the property owner, who deposited the same and received the proceeds, as appears by exhibits in evidence. Some plaintiffs acted through agents in securing the payment of their awards. In such instances the plaintiff executed a Power of Attorney with authority "to receive, collect

said land having been condemned for the opening and widening of North Island Avenue from Irving to the highway to the lake street, being in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings. On the back of this voucher was a receipt signed by the property owner or his agent, attested by witnesses and which appears in the record books; a copy of the City of Chicago's full payment of the claim account. In payment of some of the judgments this form of voucher was used. "For balance of compensation awarded that part of (level description), said land having been condemned for opening and widening North Island Avenue between Irving Park Boulevard and West Lake Street, being in full payment for said condemned land and in full of all claims for damages to same by reason of said proceedings". On the back of this voucher appears: "Received of the City of Chicago full payment of the claim account". This voucher was also attested by the property owner or his agent, as appears from exhibits in the record. On the face of each voucher were the following words: "This voucher is in accordance with the judgment of the court, and funds are available in this warrant to pay this voucher". Then the voucher had been issued and recorded by the property owner or his agent, the City of Chicago issued the check for the amount of the voucher. The check is made and every instance was made payable to the order of the property owner, as shown by exhibits in evidence. The back of each check bears the endorsement of the property owner, who deposited the same and received the proceeds, as appears by exhibits in evidence. Some plaintiffs acted through agents in securing the payment of their awards. In such instances the plaintiff executed a Power of Attorney with authority "to receive, collect

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and receipt for all sums of money, which are or shall become due, owing and belonging to me by the City of Chicago, upon or growing out of widening Ashland and my said attorney is hereby fully authorized and empowered to do and perform all necessary acts and to sign all necessary papers for the said receipt and collection * * *," as per exhibits.

September 9, 1938, plaintiffs brought this action, alleging that they had applied the above payments made by the City of Chicago first to the payment of interest and the balance to the payment of principal, and that by reason thereof they were suing for the balance of principal still due under the condemnation award, and interest from the date of partial payment.

The City of Chicago filed its motion to strike supported by affidavit and exhibits, alleging that the payments were made and accepted in full of the condemnation judgments and not upon the payment of interest as evidenced by the receipts of plaintiffs. It is also alleged that it never made any payments on account of interest or promised to pay interest.

Plaintiffs filed an amendment to their amended complaint in which they state they believe the exhibits of the defendants (the vouchers, checks and receipts of the plaintiffs or their agents) "to be true copies of the respective documents signed by the respective plaintiffs" or "by the agent of the respective plaintiffs."

The City renewed its motion to dismiss the cause of action. In support of this motion the City submitted the affidavit of George I. Keefe.

The cause was heard on the motion of the City to withdraw its pleading and dismiss the cause for the reason "that said cause includes the claims of various plaintiffs alleging that

and receipt for all sum of money, which was or will become due,

owing and belonging to me by the City of Chicago, upon or
growing out of widening A Street and by said attorney is hereby
fully authorized and empowered to do and perform all necessary
acts and to sign all necessary papers for the said receipt and
collection " " " " as per exhibit.

September 3, 1906, Plaintiff's proposed case action,

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City of Chicago first to the payment of interest and the
balance to the payment of principal, and that by reason thereof
they were suing for the balance of principal still due under
the condemnation award, and interest from the date of partial
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by the respective plaintiff" or "by the agent of the respective
plaintiff."

The City renewed its motion to dismiss the cause of
action. In support of this motion the City submitted the affi-
davit of George I. Keefe.

The cause was heard on the motion of the City to withdraw
its pleadings and dismiss the cause for the reason "that said
cause includes the claims of various plaintiffs alleging that

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there is due to each individually a certain sum or sums of money as interest on condemnation awards referred to in the amended complaint herein; that the alleged causes of action as set forth in the amended complaint did not accrue to the plaintiffs within the time limited by law for the commencement of an action". The motion was allowed and the cause dismissed.

The appeal was taken to the Supreme court but that court transferred the case to this court. No additional briefs were filed in this court. The parties, however, were heard on oral argument. The proceeding in the trial court was under Section 48 of the Civil Practice Act. The defenses relied on by the defendant City are similar to those held to be good and sufficient under substantially similar circumstances in Cohen v. City of Chicago, 377 Ill. 221, decided June 13, 1941. The Supreme court in its opinion there, at page 235, said of similar documents:

"It is our view that the language of these vouchers and the deeds and, particularly, the receipts endorsed upon the back of the vouchers, clearly indicate that it was the intention of all parties that the payments made were intended, and accepted, as full payment and liquidation of the judgments. On the face of the vouchers it clearly appears that the payments were for the balance of compensation due, which was the balance of the judgment, in each instance. The receipts on the back of the vouchers are, to the effect, that the payee, named on the face of the vouchers, and by whom the receipt is signed, has received full payment for the account described in the voucher. The language of the deeds, made simultaneously with the delivery of the vouchers and checks, definitely supports this conclusion. In our view, the record shows conclusively that it was the intention of all parties that the delivery of the vouchers and checks was in full satisfaction of the amounts of compensation, as fixed by the judgments."

The Cohen case had not been decided when the instant suits were begun. We assume if it had these actions would not have been brought.

there is due to each individually a certain sum or sum of money as interest on condemnation awards referred to in the amended complaint herein; that the alleged causes of action as set forth in the amended complaint did not survive to the plaintiff within the time limited by law for the commencement of an action". The motion was allowed and the cause dismissed. The appeal was taken to the Supreme Court but that court transferred the case to this court. No additional facts were filed in this court. The parties, however, were heard on oral argument. The proceeding in the trial court was under section 48 of the Civil Practice Act. The defendant relied on the defendant City are similar to cases held to be good and sufficient under substantially similar circumstances in City of Chicago, 377 Ill. 541, decided June 15, 1941. The Supreme Court in its opinion there, at page 535, said of similar documents:

"It is our view that the language of these vouchers and the checks and, particularly, the receipts endorsed upon the back of the vouchers, clearly indicate that it was the intention of all parties that the payments were intended, and accepted, as full payment and liquidation of the judgments. On the face of the vouchers it clearly appears that the payments were for the balance of condemnation due, which was the balance of the judgment, in each instance. The receipts on the back of the vouchers are, to the effect, that the payee, named on the face of the vouchers, and by whom the receipt is signed, has received full payment for the amount described in the voucher. The language of the checks, made simultaneously with the delivery of the vouchers and checks, definitely supports this conclusion. In our view, the record shows conclusively that it was the intention of all parties that the delivery of the vouchers and checks was in full satisfaction of the amount of compensation, as fixed by the judgments."

The Goben case had not been decided when the instant suits were begun. We assume if it had these suits would not have been brought.

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Plaintiffs argue here their right to recover costs in the trial court. We do not doubt it. However, their pleading does not allege any such costs are unpaid.

Complaint is made that plaintiffs should have had the right to reply to the City's plea of the Statute of Limitations. If they wished to do so, they could have done so under Section 48 of the Civil Practice Act. Plaintiffs did not avail themselves of that privilege. Moreover see Blakeslee's Warehouses v. City of Chicago, 369 Ill. 480.

The judgment of the trial court will be affirmed.

AFFIRMED.

Niemeyer, J., and O'Connor, J., concur.

plaintiffs have their right to recover...

the trial court... is not bound by...
not allege any such facts...

complaint is made that plaintiffs...

right to rely on the fact that...
If they wished to do so, they could have done so before...
of the Civil Service Act...
relief of that relief...
City of Chicago, 203 Ill. 2d...

The judgment of the trial court...

...

Wienberger, J., and J. J. ...

43215

WERNER W. HUYLER,

Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3261A. 35

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a trial before the court and a jury of an action filed in the Circuit Court of Cook County by Werner W. Huyler against the City of Chicago to recover damages for personal injuries sustained when the car he was driving collided with a safety island and light post thereon at Ridge Avenue and Clark Street, the jury returned a verdict for plaintiff in the sum of \$100,000. Before the trial, the complaint was amended to show that Huyler had been adjudged mentally ill and incompetent in a County Court proceeding and Edward M. Herman was appointed conservator of his estate by the Probate Court. Defendant's motions for a directed verdict, for judgment notwithstanding the verdict, for a new trial and in arrest of judgment were overruled, and judgment was entered on the verdict. Defendant appeals. For convenience we will refer to Werner W. Huyler as plaintiff. Plaintiff's theory of the case is that defendant violated its duty to maintain its streets in a reasonably safe condition, by not exercising ordinary care to sufficiently warn traffic of the danger of an island and pole in the roadway; and that numerous prior accidents had occurred by reason of vehicles colliding with the island and pole, which tended to show that the common cause was unsafe and dangerous, and raised a presumption of the City's knowledge of such condition. Defendant's theory of the case is that the safety island and pole were constructed properly, were lighted adequately, so that they did not constitute a dangerous

WERNER W. HUYER,

Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,

Appellant.

MR. PRESIDING JUDGE BURKE delivered the opinion of the court.

In a trial before the court and a jury of an action

filed in the Circuit Court of Cook County by Werner W. Hoyer

against the City of Chicago to recover damages for personal injuries

sustained when the car he was driving collided with a safety island

and light post thereon at a place known as 12th Street, the jury

returned a verdict for plaintiff in the sum of \$10,000. Before

the trial, the complaint was amended to read that Hoyer had been

adjudged mentally ill and incompetent in a County Court proceeding

and Edward W. Herman was appointed conservator of his estate by the

Probate Court. Defendant's motion for a directed verdict, for

judgment notwithstanding the verdict, for a new trial and in arrest

of judgment were overruled, and judgment was entered on the verdict.

Defendant appeals. For convenience we will refer to Hoyer as

Hoyer as plaintiff. Plaintiff's theory of the case is that

defendant violated its duty to maintain its streets in a reasonably

safe condition, by not exercising ordinary care to sufficiently warn

traffic of the danger of an island and pole in the roadway; and that

numerous prior accidents had occurred by reason of vehicles colliding

with the island and pole, which tended to show that the common

cause was unsafe and dangerous, and raised a presumption of the

City's knowledge of such condition. Defendant's theory of the case

is that the safety island and pole were constructed properly, were

lighted adequately, so that they did not constitute a dangerous

condition for travel or traffic; and that it was not guilty of any negligence causing the plaintiff's injuries, but that his injuries were due to his failure to exercise due care and caution for his safety.

The intersection of Ridge Avenue and Clark Street is an unusual one. Clark Street runs north and south and is 94 feet from curb to curb. There are street car tracks on this street, the distance being 39 feet, 7 inches to the car tracks from each curb, and the tracks occupying 14 feet of the street. Ridge Avenue, a through street, runs northwest and southeast. Ridge Avenue, east of Clark Street, is 44 feet wide, while west of Clark Street it is 60 feet wide. Ridge Avenue, going north, west of Clark Street, is at a changed angle from east of Clark Street, turning south about 5 degrees from the 40 degree angle formed by Ridge Avenue crossing Clark Street. This makes a slight kink in Ridge Avenue east and west of Clark Street. West of Clark Street, Ridge Avenue angles slightly to the west. On the west side of Clark Street, in the center of Ridge Avenue, is the safety island, a concrete block 5 inches high. A light pole rises from the center of the island, 15 feet, 4 inches from the southeast edge. It is 30½ feet high. At 22 feet above street level is a bracket burning two 10,000 lumen lamps with a porcelain enamel reflector over each to direct the light down and out. Each light is the equivalent of a 500 watt lamp on a 120 volt circuit. At each corner of the intersection are city light poles bearing the customary street lights of 10,000 lumen lamps with porcelain enamel reflectors above them. In addition to these lights at the corners of the intersection, on the west curb of Clark Street 137 feet north of the safety island is a lamp, northwest on Ridge Avenue there are three such lamps within 250 feet, one on the south side of Ridge Avenue 97 feet from the post, one on the north side, 175 feet from the post, and one on the south side, 250 feet

condition for travel or traffic; and that it was not guilty of any negligence causing the plaintiff's injuries, but that his injuries were due to his failure to exercise due care and caution for his safety.

The intersection of Ridge Avenue and Clark Street is an unusual one. Clark Street runs north and south and is 32 feet from curb to curb. There are street car tracks on this street, the distance being 38 feet, 7 inches to the car tracks from each curb, and the tracks occupying 14 feet of the street. Ridge Avenue, a through street, runs northwest and southeast. Ridge Avenue, east of Clark Street, is 44 feet wide, while west of Clark Street it is 60 feet wide. Ridge Avenue, going north, west of Clark Street, is at a changed angle from east of Clark Street, turning south about 5 degrees from the 40 degree angle formed by Ridge Avenue crossing Clark Street. This makes a slight kink in Ridge Avenue east and west of Clark Street. West of Clark Street, Ridge Avenue angles slightly to the west. On the west side of Clark Street, in the center of Ridge Avenue, is the safety island, a concrete block 5 inches high. A light pole rises from the center of the island, 10 feet, 4 inches from the southeast edge, it is 30 1/2 feet high, at 22 feet above street level is a bracket bearing two 10,000 lumen lamps with a porcelain enamel reflector over each to direct the light down and out. Each light is the equivalent of a 500 watt lamp on a 120 volt circuit. At each corner of the intersection are city light poles bearing the customary street lights of 10,000 lumen lamps with porcelain enamel reflectors above them. In addition to these lights at the corners of the intersection, on the west curb of Clark Street 137 feet north of the safety island is a lamp, northwest on Ridge Avenue there are three such lamps within 250 feet, one on the south side of Ridge Avenue 87 feet from the post, one on the north side, 175 feet from the post, and one on the south side, 250 feet

from the post. On the east side of Clark Street, on the east curb there is a lamp south of the north property line of North Thorndale Avenue, 125 feet from the pole on the island. Thorndale Avenue, an east and west street, runs into Clark Street from the east a short distance north of Ridge Boulevard, but does not intersect Clark Street. The light on the northeast corner of Clark Street and Ridge Avenue is 138 feet from the post on the island, and a light at the southwest corner of Clark Street and Ridge Avenue is 200 feet from the post. On the south side of Ridge Avenue, 22 feet from the east property line of Clark Street, is a light which is 225 feet from the post, and on the north side of Ridge Avenue 270 feet from the post is another light, in addition to all of which there are more lights further down the street. South from the pole there are two lights on Clark Street, one on the southwest corner of the intersection and one at the southeast corner, and other lights further away. All of these lights are 10,000 lumen lamps, each the equivalent of a 500 watt lamp on a 120 volt circuit, the largest size street lamp in defendant's lighting system.

At the time of the occurrence, Monday, March 16, 1942, plaintiff was 44 years of age, married and the father of six children ranging in age from 2½ years to 16 years. He lived with his family in a home in Wilmette. On Sunday afternoon the Huyler family was invited to attend a 50th wedding anniversary celebration in honor of Mr. and Mrs. Thomas Stafford, the uncle and aunt of plaintiff's wife. He left his home accompanied by his wife and two daughters in his four door Chevrolet sedan automobile, which he was driving. He first drove to 6033 North Mozart Street in Chicago, where he called for Mrs. Colette Stafford, his sister-in-law. They arrived there about 3:00 p.m. and left a few minutes later. He then drove to 2000 Lincoln Park West, where Mr. and Mrs. John W. Stafford, his father-in-law and mother-in-law, were waiting to be transported to the party.

The celebration was to be held at St. Columkille Day Nursery, 527 North Paulina Street, Chicago. The group arrived there about 4:00 p.m. The party was attended by many associated with the nursery, the family and old friends. There were no liquors served to any of the guests and plaintiff had none. The party lasted no longer than 4 hours, in deference to the age of the celebrants. The Huyler group left at around 8:00 p.m. They first went to the Stafford residence at 2000 Lincoln Park West, where they visited the new apartment into which the Staffords had but recently moved. They stayed about a half hour. They then went to plaintiff's home in Wilmette, arriving there about 10:00 p.m. Plaintiff's wife served refreshments consisting of coffee and cake about 11:00 p.m. While there, it began to rain and the guests stayed on in the hope that the downpour would cease. At about 12:30 a.m. they felt that the rain had sufficiently abated for them to leave, and Mrs. Colette Stafford and Mr. and Mrs. John Stafford and plaintiff went into the automobile. Plaintiff's wife and daughters remained at home with the rest of the children. The car was equipped with double windshield wipers, which were properly operating. The car was in good order. It was raining hard and it was very dark and plaintiff drove at a low rate of speed. He first drove Mrs. Colette Stafford to her home and then drove Mr. and Mrs. John Stafford to their home. Plaintiff was then alone and he turned his car around for the homeward journey.

At a time variously set by the witnesses at 2:00 a.m. and 2:45 a.m. Monday, plaintiff was driving in a northwesterly direction on Ridge Avenue at its intersection with Clark Street. In his deposition, which was received in evidence at the trial, he testified that a light rain was falling and that it had rained very hard prior to midnight; that there were no street lights burning on Ridge Avenue or on Clark Street as he approached; that there was no light on the safety island just west of Clark Street in the center of Ridge Avenue,

or on the pole on the island; that the lights were out; that he was going 20 or 25 miles an hour; that his windshield wipers were working; that his headlights were burning; that he could see 200 or 300 feet ahead; that approaching Clark Street there is a white line in the center of Ridge Avenue that swings to the right of the safety island; that if one follows the line he will hit the island; that he saw the island when he was 5 or 10 feet away and collided with it, straddling the island and striking the post. His wife testified that they had driven over the intersection 10 or 15 times before the occurrence, both day and night. There was no other traffic at the time. There were stop and go traffic lights at the intersection. The traffic light for his direction of travel was green and he drove across Clark Street with the wheels of his car one foot north of the center line. The car straddled the concrete island and smashed into the post. The police were notified within a few minutes after the collision and arrived a short time later. Plaintiff was unconscious. The police lifted him out of the car, placing a temporary splint upon his right leg, and drove him to the Edgewater Hospital, located in the vicinity. At the Edgewater Hospital he was taken to the emergency room and was first attended by Dr. Blou, an interne. He remained in that room from about 2:45 to 5:20 a.m. He was semi-conscious. Dr. McGarry, the family physician, arrived at about 3:00 a.m., sutured the lacerations on his face and neck and applied a metal splint to his right ankle. His tongue was thick, swollen and discolored with some bleeding. The emergency nurse assisted in the first examination and remained until he was removed to a private room. It was part of her duties to note whether the injured person had imbibed intoxicating liquor. She did not smell any such odor on his breath. Witnesses for plaintiff testified he had no alcoholic drink during any of the time he was with them on the Sunday afternoon and evening before the mishap.

on the sole in the island; that the light was not; that it was
going to or to after an hour; that the light was not; that it was
that his headlights were broken; that he was not; that it was
test ahead; that approaching; that the light was not; that it was
the center of the island; that the light was not; that it was
island; that it was before the line in with the light; that it was
he saw the island when he was on the light; that the light was not;
stretching the light; that the light was not; that it was
they had driven over the light; that the light was not; that it was
occurrences, both by an hour; that the light was not; that it was
time. There were also on the light; that the light was not; that it was
The traffic light for the location of the light; that the light was not;
across Clark Street; that the light was not; that it was
center line. The car stopped; that the light was not; that it was
the road. The car was not; that the light was not; that it was
collision and was a short time later; that the light was not;
The police lifted him out of the car; that the light was not; that it was
his right leg; that the light was not; that it was
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room and was first attended by the light; that the light was not;
that room from about 1:45 to 2:00; that the light was not; that it was
McCurry, the family physician; that the light was not; that it was
the lacerations on his face; that the light was not; that it was
his right ankle. His torso; that the light was not; that it was
some bleeding. The emergency nurse; that the light was not; that it was
and remained until he was removed to a private room. It was not;
of her duties to note whether the injured person had a blood intoxication
liability. She did not smell any such odor on his breath. It was not;
plaintiff testified he had no alcoholic drink during any of the time
he was with them on the Sunday afternoon and evening before the accident.

Louis Jessen, who worked in the oil station at the southwest corner of the intersection, testified that he arrived at the scene of the occurrence immediately after the collision of plaintiff's car with the light post and smelled no alcohol on his breath. The two policemen first on the scene who removed him from his automobile, testified that there was an odor of liquor on plaintiff's breath and that he told them he had a couple of glasses of beer around midnight. The officer who drove plaintiff to the hospital in the patrol wagon smelled liquor on his breath and heard him tell one of the officers he had some beer. Two officers from the Accident Prevention Squad, who took a statement while he was in the emergency room at the hospital, testified that they could smell a strong odor of intoxicating liquor on his breath, that he stated he had drinks, and that his statement was put in a written accident statement which he signed. All five officers testified he conversed with them after the accident.

In addition to the head injury, two bones of the right ankle had been fractured three times, leaving five broken surfaces. This injury is known as a tri-malleolar fracture. Dr. Peter Bassoe, a specialist in nervous and mental diseases, was called in for consultation on March 19, 1942. He recommended that an exploratory operation be made of the brain. Dr. Adrien VerBrugghen, a specialist in brain surgery, examined plaintiff at the Edgewater Hospital at Dr. McGarry's request. He recommended an immediate operation be performed at St. Francis Hospital. Later that same night Dr. VerBrugghen operated by making an incision in the skull and boring a hole the size of a dollar in the left side thereof. A fine needle was inserted through the brain to a depth of about 3 to 5 centimeters and about $\frac{1}{2}$ ounce of blood was withdrawn. The brain then collapsed and started to pulsate. Plaintiff first recognized his wife 7 or 8 days after the operation, but he did not recognize pictures of 5 of

Louis Jessen, who worked in the oil station at the south end of the intersection, testified that he arrived at the scene of the occurrence immediately after the collision of plaintiff's car with the light post and walked on a sidewalk on the north side of the intersection. He testified that there was an odor of liquor on plaintiff's person and that he told them he had a couple of drinks a few days before. The officer who drove plaintiff to the hospital in the patrol wagon called him on his breath and asked him if he had drunk. The officers he had seen were. The officers from the patrol wagon took a statement while he was in the emergency room at the hospital, testified that they could smell a strong odor of intoxicating liquor on his breath, that he stated he had drunk, and that his statement was put in a written report which he signed. All five officers testified he conversed with them after the accident.

In addition to the head injury, the bones of the right ankle had been fractured three times, having five times undergone surgery. This injury is known as a Colles' fracture. A specialist in nervous and mental diseases, was called in for consultation on March 19, 1942. He recommended that an exploratory operation be made of the brain. Dr. Arthur Verbrugge, a specialist in brain surgery, examined plaintiff at the Roosevelt Hospital at Dr. McGarry's request. He recommended an immediate operation be performed at St. Francis Hospital. Later that same night Dr. Verbrugge operated by making an incision in the skull and boring a hole the size of a dollar in the left side thereof. A fine needle was inserted through the brain to a depth of about 3 to 5 centimeters and about 1/2 ounce of blood was withdrawn. The brain then collapsed and started to pulsate. Plaintiff first recognized his wife 7 or 8 days after the operation, but he did not recognize pictures of 3 of

his 6 children. He remained in the hospital for 19 days and was then taken to his home where he remained in bed until the latter part of May, 1942. The cast on his right leg was then removed and he moved about the house on crutches. During the first week in July he was taken to Pittsburgh to visit his sister, but upon his return he went to Waukesha, Wisconsin to obtain therapy on his leg. For 9 years prior to March 16, 1942 he was employed as sales representative for the Standard Pressed Steel Company, assigned to its Chicago office. It was necessary that he have a thorough engineering knowledge of all shop operations and he had gathered this from schooling and his years of experience in the field. He was a sales engineer, rather than a salesman. The officers of his company had arranged to name him as a district manager for a southwest territory, to start on January 1, 1943. That did not occur because of the injury suffered by him. He earned \$11,861.56 for the year 1941 and \$17,810.13 for 1942. He had no source of income other than that received from his employer. As a district manager his earnings would have been substantially increased over those received by him as a sales representative. He first returned to his desk at the Standard Pressed Steel Company in October, 1942, but it was not until after Christmas of that year that he stayed at work for a full day. He continued there until April of 1943. During this entire period he imagined people were "making fun of him". He had difficulty in remembering names, faces and things that had once been very familiar to him. In May of 1943 it was suggested by his employer that he try to work in St. Louis with the hope that the change of environment would improve his condition. He returned of his own volition within one day, stating that he wanted to commit suicide and was fearful of that. He was placed in Kenilworth Sanitarium, where he remained for 4 weeks and was released about the first of June. At that time he received a letter from his employer terminating his employment. He was discharged because he was incapable of performing

any duties in the aid of the business of his employer. In January, 1944 he threatened his wife and said to her that he did not want to go on living and that he would take her with him. A week or so later he told his wife to prepare for a shock. She then spoke to Dr. McGarry, who recommended that he be taken to the Psychopathic Hospital, which was done. In February, 1944 an order was entered in the County Court, based upon medical opinion, finding plaintiff to be of unsound mind and committing him to the Chicago State Hospital at Dunning.

Defendant maintains that as a matter of law, it was not guilty of negligence in constructing and maintaining the safety island and light pole. It is the duty of a municipality to exercise reasonable care and diligence to keep and maintain its streets in a reasonably safe condition for the use of the public traveling thereon. Plaintiff urges that the roadway was dangerous because of the manner in which the island was maintained. The island was completed by defendant on January 28, 1941. A safety island is a legalized obstruction in the city streets. The city authorities, in the exercise of their official functions, are vested with the authority to devise and construct needed and necessary traffic guides and controls by virtue of the city's jurisdiction and control of the streets. We agree with plaintiff that it became relevant to determine from all the surrounding circumstances whether the city was negligent in the maintenance of the roadway after it placed the obstruction upon it. Louis Jessen, who was employed from September, 1941 to February, 1943 at the gas station located at the southwest corner of the intersection, testified that there were no indications on the street or on the post to denote the presence of the post; that the lights on the island do not shine very good; and that the pole blended with an apartment building back in the block. On cross-examination, he admitted he could see the pole from his station the night of the occurrence. Lyle Brown was also employed at the service station located at the southwest corner of

any duties in the aid of the business of his company. In January, 1944 he threatened his wife and said to her that he did not want to go on living and that he would take her with him. A week or so later he told his wife to prepare for a shock. She then wrote to the doctor, who recommended that he be taken to the Psychopathic Hospital, which was done. In February, 1944 an order was entered in the County Court, based upon medical opinion, finding Plaintiff to be an insane mind and committing him to the Chicago State Hospital at Joliet.

Defendant maintains that as a matter of fact, it was not guilty of negligence in constructing and maintaining the safety island and light pole. It is the duty of a municipality to exercise reasonable care and diligence to keep and maintain its streets in a reasonably safe condition for the use of the public traveling thereon. Plaintiff urges that the roadway was dangerous because of the manner in which the island was maintained. The island was completed by defendant on January 28, 1941. A safety island is a legalized obstruction in the city streets. The city authorities, in the exercise of their official functions, are vested with the authority to devise and construct needed and necessary traffic guides and controls by virtue of the city's jurisdiction and control of the streets. We agree with Plaintiff that it became relevant to determine from all the surrounding circumstances whether the city was negligent in the maintenance of the roadway after it placed the obstruction upon it. Louis J. Jenson, who was employed from September, 1941 to February, 1943 at the gas station located at the southwest corner of the intersection, testified that there were no indications on the street or on the post to denote the presence of the post; that the lights on the island do not shine very good; and that the pole blended with an apartment building back in the block. On cross-examination, he admitted he could see the pole from his station the night of the occurrence. This shown was also employed at the service station located at the southwest corner of

the intersection. He worked there in February and March, 1941. On direct examination he testified that driving toward the island at night the post was black and dingy, and that about the only thing one could see were the 2 lights about 20 or 25 feet in the air. On cross-examination, he testified that it was not a well lighted intersection, and that the conditions in March, 1942 were exactly the same. Victor Kaufman managed the gas station on the northeast corner of the intersection which faced toward the post, from February, 1941 until the end of March, 1942. He was well acquainted with the corner. The distance from his gas station to the post was 110 feet. There was nothing to obstruct his view looking toward the post. He testified that the pole was not noticeable "from either our driveway or the gas station office", because the market behind the gas station on the southwest corner "created a dark background into which the pole blended"; that the "background was very dark at night and that the post from the gas station was absolutely not noticeable at night". He testified further that during March, 1942 he had occasion to approach the post from the east in an automobile every evening on his way home, and that on such occasions the post was noticeable "only when you got real close to it". On cross-examination, he testified that the light that was thrown from the post on to the island did not show the abutment on the street; that for traffic going west on Ridge Avenue the post was not noticeable; that he could not see the abutment when it was dark; and that "the island positively wasn't noticeable from my gas station or from this corner". There was evidence from which the jury had the right to conclude that defendant failed to keep the post in such condition as to be visible to those on the highway. At the time it was erected, the post was striped as a warning to motorists that an obstruction was present. This imposed on the defendant the responsibility of keeping the post painted and clean so as to make it visible to those driving vehicles. There was evidence which warranted the jury in finding that the defendant did not fulfill this duty in this behalf.

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Plaintiff's testimony also discloses that 9 or 10 similar occurrences, preceding his, happened at the same place, all involving northwest bound cars and that the City was notified of each. The case of Rohwedder v. City of Chicago, 322 Ill. App. 700, reported in abstract form, presented a state of facts parallel with the facts in the instant case. The mishap occurred at the same intersection and involved the maintenance of the same island. In the Rohwedder case the visibility of the pole and island was reduced by snow, while in the instant case such visibility was reduced by rain. In that case it was disclosed that 9 or 10 similar accidents preceded plaintiff's mishap, all involving northwest bound cars. It is undisputed that defendant had done nothing to the pole or the island to reduce the dangers to motorists since the mishap which was the basis of the Rohwedder case, in which the jury returned a verdict for plaintiff in the sum of \$10,000. The trial court entered judgment notwithstanding the verdict in favor of defendant. Upon appeal we reversed the judgment and remanded the cause with directions to enter judgment upon the verdict. A petition for leave to appeal was denied by the Supreme Court on September 14, 1944. From a careful consideration of the record, we are convinced that there was competent evidence to sustain plaintiff's charge that defendant was guilty of negligence which was the proximate cause of the mishap, in maintaining the safety island and pole, and that plaintiff was in the exercise of due care and caution for his own safety at and about the time of the mishap.

Defendant also argues that the verdict is against the manifest weight of the evidence, insisting that plaintiff failed to prove that defendant was guilty of negligence which was the proximate cause of his injury, or that he was in the exercise of due care and caution for his own safety at and immediately prior to the time of the occurrence. We find that the verdict is not against the manifest weight of the evidence. The evidence presented questions of fact which the jury was competent to pass upon. We have not outlined the testimony

introduced on behalf of the City. This testimony tended to show that the City was not negligent in the construction and maintenance of the island and pole and that plaintiff was guilty of contributory negligence. Our view is that these issues presented disputed questions of fact which the jury resolved in favor of plaintiff, and that in so doing there was a sound basis for the jury's findings. There was a serious conflict in the evidence as to whether plaintiff was intoxicated, or at least under the influence of intoxicating liquor. It is evident that the jury resolved this dispute in favor of plaintiff and we are of the opinion that there was competent evidence on which to base such a finding.

There was received in evidence, without objection, plaintiff's Exhibit No. 20, the plan prepared by defendant showing the proposed channelization of the intersection, in which it was stated under the heading of "General Notes", that reflector buttons were to be provided for during construction. The evidence shows that the reflector buttons mentioned in the legend were not installed. Defendant urges that the court erred in permitting plaintiff to call to the jury's attention the legend that reflector buttons were to be provided for. This exhibit was admitted for the purpose of impeachment. A witness for the City testified that the intersection was adequately illuminated. This witness had previously, by approval and endorsement of such plan, shown that reflector buttons were necessary. We are of the opinion that the court did not err in permitting plaintiff's attorney to call the jury's attention to the legend. Defendant also complains of the action of the court in refusing to permit its traffic engineer to testify that the plan was not the final plan adopted by the City. We are of the opinion that the court should have permitted the City to so show. However, the court's action did not harm defendant. The jury knew that the island and pole were erected by the City authorities and must have concluded that the manner in which the project was

...in the ... of the ...
...the City ... not ...
...and ... of ...
...negligence ...
...of fact which ...
...of doing ...
...a serious ...
...interested ...
...It is evident ...
...and ... of ...
...to have ...
...There ...
...which ...
...channelization ...
...bearing of " ...
...for ...
...buttons ...
...that the ...
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...This exhibit ...
...for the City ...
...This witness ...
...shown that ...
...that the ...
...the jury's ...
...action of the ...
...testify that ...
...are of the ...
...so show ...
...jury knew ...
...and must have ...

completed was in accordance with the determination of the proper officials.

Defendant maintains that the court erred in admitting evidence as to prior mishaps. We are of the opinion that the evidence as to prior mishaps was admissible for the purpose of showing that defendant had notice of the conditions prevailing and also for the purpose of showing that the common cause of such mishaps was a dangerous and unsafe instrumentality. The court did not err in admitting this evidence. Defendant asserts that the court erred in limiting the cross-examination of Katherine Bertola, a nurse at the Edgewater Hospital. We are of the opinion that there was no abuse of discretion in so limiting the cross-examination.

Defendant complains of the refusal to give the following instruction:

"The court instructs the jury that the burden of proof is not upon the defendant to show that it is not guilty of the specific negligence charged in the complaint, or in some count thereof, but the burden is upon the plaintiff to prove that the defendant is guilty, and this rule as to the burden of proof is binding in law, and must govern the jury in deciding the case. The jury have no right to disregard said rule or to adopt any other in lieu thereof, but in considering the evidence and coming to a verdict, the jury should adhere strictly to said rule."

The court gave the following instruction:

"The jury are instructed that the plaintiff is required by law to prove his case by a preponderance of the evidence before he can recover. If the plaintiff in this suit has not so proven his case, or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendants, then, in either of these cases, the verdict should be not guilty. The court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff was injured as the result of the accident which occurred without the fault either of the plaintiff or of the defendant, or either of them, then you are instructed the plaintiff cannot recover and you should find the defendant not guilty."

We agree with plaintiff that the refused instruction was repetitious. Defendant also complains of the refusal of the court to give the following instruction:

"The court instructs the jury that the fact of the happening alone is not any evidence of negligence on the part of the defendant, but before the plaintiff can recover he must prove by a preponderance of the evidence that the defendant was guilty of negligence which caused the injury, and that the plaintiff himself was free from any want of ordinary care for his own safety."

completed was in some degree with the intention of the defendant.

Defendant's intention was to cause injury to the plaintiff.

evidence as to the intention of the defendant.

as to the intention of the defendant.

defendant had notice of the condition of the thing and that the

purpose of showing that the condition was such as to

dangerous and unsafe instrumentality.

admitting this evidence, defendant's conduct was negligent in

limiting the jury's consideration of the evidence.

defendant's conduct, to show the intent that the injury

of intention in so limiting the jury's consideration.

Defendant's conduct of the injury.

Instruction:

"The court instructs the jury that it is not sufficient to show that the defendant was negligent in the conduct of the thing, or in some other respect, but the burden is upon the plaintiff to show that the defendant's conduct was negligent in the conduct of the thing, and this rule is to be applied to the evidence in the case, and the jury in reaching its verdict, should consider the evidence and apply the rule, and adhere strictly to the rule."

The court gave the following instruction:

"The jury are instructed that the plaintiff has the burden of law to prove his case, and that he must do so by a preponderance of the evidence. If the plaintiff in this case has not shown this, or if the evidence is evenly balanced, or if the evidence is in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendant, then, in either of these cases, the verdict should be for the defendant. The court instructs the jury that it is not sufficient to show that the plaintiff was injured as the result of the defendant's evidence that the plaintiff was injured as the result of the defendant's conduct without the fault either of the plaintiff or of the defendant, or either of them, then you are instructed the plaintiff cannot recover and you should find the defendant not guilty."

We agree with plaintiff that the record in this case was reversible.

Defendant also complains of the refusal of the court to give the

following instruction:

"The court instructs the jury that the fact of the happening alone is not any evidence of negligence on the part of the defendant, but before the plaintiff can recover he must prove by a preponderance of the evidence that the defendant was guilty of negligence which caused the injury, and that the plaintiff himself was free from any want of ordinary care for his own safety."

The court gave the following instruction:

"The court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff was injured as the result of the accident which occurred without the fault either of the plaintiff or the defendant, or either of them, then you are instructed the plaintiff cannot recover and you should find the defendant not guilty. You are instructed that with reference to its streets the City of Chicago is not an insurer against accident; nor is it required, under the law, to keep its streets in an absolutely safe condition; nor is it required to exercise the highest degree of care, or extraordinary degree of care, to keep the same in a reasonably safe condition for ordinary travel thereon, nor is it required to so construct and maintain its streets as to secure immunity from accident to persons who may have occasion to pass over or along the same in ordinary modes of travel. Its only duty being to exercise ordinary care to keep its streets in a reasonably safe condition."

We are of the opinion that the substance of the refused instruction is amply covered in the two quoted instructions. Defendant asserts that the court erred in refusing to give the jury the following instruction:

"If you believe from the evidence that the automobile in which plaintiff was riding was driven over and across the portion of the street where the accident was alleged to have occurred at a rate of speed that was negligent, and that said negligence, if any, was the cause of the accident in question and that the proximate cause of the accident in question was the speed at which the automobile was driven, that the condition of said street was not the proximate cause of said accident, then you should find the defendant, City of Chicago, not guilty. If you believe from the evidence that the driver was negligent in driving his car on the occasion in question, and that the condition of the road was such that no injury would have been suffered by the plaintiff if the driver had exercised ordinary care in driving said car, then there can be no recovery against the City of Chicago."

Defendant states that these instructions should have been given because they represented a portion of the theory of the defendant at the trial of the case. The court instructed the jury as follows:

"If you believe from the evidence, that at the time and place in question the plaintiff did not exercise that degree of care and prudence which an ordinarily careful and prudent person would use under like circumstances, as shown by the evidence, then the plaintiff is not entitled to recover, and you should find the defendant, City of Chicago, not guilty. If you believe from the evidence that prior to the time of the accident in question the plaintiff was familiar with the condition of the street, at the place where the said accident is alleged to have occurred and knew that a dangerous

condition existed there or that, by reason of having used said street, at said place prior to the time of said alleged accident he would or should have known of such dangerous condition, if any there was, then you are instructed that he was in duty bound to use such care and caution for his own safety commensurate with the knowledge which he had, or which by the exercise of ordinary care on his part he would or should have had, of such condition of said street at said time and place, and if you believe from the evidence that he did not use such care and caution for his own safety at the time and place in question and that such failure to use such care proximately contributed to cause the alleged accident, then you should find the issues for defendant City of Chicago."

We are of the opinion that the court did not err in refusing to give the instruction quoted and that the jury was fairly and fully instructed on all the issues presented and supported by the evidence. Defendant urges that the court erred in failing to instruct the jury in the proper use of the mortality table which was offered in evidence by plaintiff. The table showed that the plaintiff had a life expectancy of 26.32 years. This table was admitted by agreement of the parties. Plaintiff's instruction on damages did not contain any direction to the jury as to the use of the mortality table in the measurement of damages. Defendant did not tender any instructions with respect to the use of the mortality table. Under the circumstances, the court did not err in failing to give a special instruction on the subject.

Finally, defendant insists that the sum of 100,000.00 is excessive and not the result of careful deliberation. The automobile damage amounted to \$750.00, and there was expended for nurses, hospital and medical care the sum of \$1,424.09. Plaintiff's physical injuries were serious, as a result of which he became insane and had to be confined to an insane asylum. The medical witnesses testified that the mental disease so brought about is permanent. He was a man of technical training whose income was rising with the years, having reached a point of over \$17,000 at the time of the mishap. If we assume that he would live to be 70 years of age, that would give him 26 years more for continued application to his position. The

condition existed there or if, by reason of having been at said place prior to the time of said accident, he should have known of such dangerous condition, at any time then you are instructed that he was in duty bound to use such care and caution for his own safety as a prudent person would have had, or which by the exercise of ordinary care on his part he would or should have had, of such condition of said street at said time and place, and if you believe from the evidence that he did not use such care and caution for his own safety at the time and place in question and used such failure to use such care and caution as constituted to cause the alleged accident, then you should find the issues for defendant City of Chicago.

We are of the opinion that the court did not err in refusing to give the instruction requested and that the jury was fairly and fully instructed on all the issues presented and we are of the opinion that the court was not in error in refusing to give the instruction requested. Defendant urges that the court erred in refusing to instruct the jury in the proper use of the statistical table which was submitted in evidence by plaintiff. The court found that the statistical table was a life expectancy of 46.86 years. This table was submitted by plaintiff of the parties. Plaintiff's life expectancy was found to be 46.86 years. Any direction to the jury as to the use of the statistical table in the measurement of damages. Defendant is not to be given any instructions with respect to the use of the statistical table. Taking the circumstances, the court did not err in refusing to give a special instruction on the subject.

Finally, defendant insists that the amount of \$100,000.00 is excessive and not the result of careful deliberation. The automobile damage amounted to \$750.00, and there was no other damage. Plaintiff's physical hospital and medical care was \$1,000.00. Plaintiff's physical injuries were serious, as a result of which he became lame and had to be confined to an insane asylum. The medical witness testified that the mental disease so brought about is permanent. He was a man of technical training whose income was rising with the years, having reached a point of over \$17,000 at the time of the accident. It is assumed that he would live to be 70 years of age, that would give him 25 years more for continued application to his position. The

mortality table gave him 26.32 years. On that basis alone there would be a loss of earnings totaling over \$440,000. Defendant maintains that the closing argument of plaintiff's counsel was prejudicial and inflammatory. The closing arguments are not in the record. Defendant presents the record of a statement of defendant's counsel during the motion for a new trial, as to what was argued to the jury. There is nothing in the record to support defendant's contention that plaintiff's counsel prejudiced the jury by improper argument. In our view the judgment of \$100,000 is not excessive. For the reasons stated, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

KILEY, J. CONCURS.

LEWE, J. TOOK NO PART.

mortality table gave him 57 years. On the basis of this
 he a loss of earnings totaling over \$40,000. It was
 that the closing expense of \$1,000.00 was paid in
 and inflationary. The closing expense was paid in 1940.
 Defendant presented the record of a check for \$1,000.00 dated
 during the period from 1940 to 1941, and that a check for \$1,000.00
 there is nothing in the record to show that the check was cashed.
 that plaintiff's account reflected the loss by her husband.
 in the view the amount of \$100,000 is not shown. For the
 reasons stated, the judgment of the court is reversed and
 affirmed.

JAMES H. HARRIS

KELLY, J. HARRIS

JAMES H. HARRIS

43174

NOBLE W. LEE and THE JOHN MARSHALL
LAW SCHOOL, a corporation not for
profit,

Plaintiffs - Appellees,

v.

RALPH E. MORRIS, et al,

Defendants,

Interlocutory Appeal of RALPH E. MORRIS,

Defendant - Appellant.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

Defendant Morris has appealed from an interlocutory order granting a temporary injunction. (Chap. 110, Par. 202, Sec. 78 Ill. Rev. Stats.) Plaintiff's motion to dismiss the appeal because the issues have become moot was taken with the case.

The complaint was filed May 12, 1944 and the same day the injunction issued without notice or bond restraining defendants from "interfering with the use and operation" of certain printing material and equipment; and from "spending or conveying" certain moneys. Plaintiff alleged that Morris received the property and money as his trustee, and that the several defendants had conspired to withhold the trust property from him. The injunction issued in accordance with Count I of the complaint which in addition sought other remedies. Count 2 "At Law" sought damages.

The interlocutory order was entered May 12, 1944 and defendant's appeal bond was filed June 14, 1944, 33 days thereafter. Defendant's motion to dissolve was denied May 19, 1944. Defendant argues in his brief, and his appeal bond recites, that the appeal is from the order granting the injunction. Plaintiff, therefore, urges that we have no jurisdiction to consider the appeal since

HOME & THE LINDSAY LINDSAY
LAW SCHOOL, a corporation not for
profit,

LAW SCHOOL, a corporation not for

plaintiff - respondents,

THE LINDSAY LINDSAY

LAW SCHOOL, a corporation not for

THE LINDSAY LINDSAY

defendant.

Interlocutory order of the court.

Defendant - Respondent.

THE LINDSAY LINDSAY

THE LINDSAY LINDSAY

Interlocutory order of the court.

granting a temporary injunction. (See, also, p. 78)

Ill. Rev. Stat., ch. 110, § 110, which provides that

the laws have become part of the law of the State.

The court has held that the laws of the State

the injunction issued without notice to the defendant.

from "interfering with the use and enjoyment" of certain

material and equipment; and from "conveying" certain

money. Plaintiff alleged that certain property and

money as his trustee, and that the certain defendant had

to withhold the trust property from him. The injunction issued in

accordance with Count 1 of the complaint which in addition sought

other remedies. Count 2 "at law" sought damages.

The interlocutory order was entered May 1, 1944 and

defendant's appeal bond was filed June 14, 1944, 3 days thereafter.

Defendant's motion to dissolve was denied May 19, 1944. Defendant

argued in his brief, and his appeal bond recited, that the appeal

is from the order granting the injunction. Plaintiff, therefore,

urges that we have no jurisdiction to consider the appeal since

the appeal bond was not filed within 30 days of the order granting the injunction, even if such an appeal were available to defendant; that defendant has by that provision in his bond and by his argument eliminated the denial of the "motion to dissolve" as the basis of his appeal under Sec. 78 Civil Practice Act; and there was no motion "to vacate" as required by the Supreme Court Rule 31 to furnish a basis for the appeal. Under Section 78 of the Practice Act (Chap. 110, Par. 202 Ill. Rev. Stats.) an appeal may be taken from an order granting a temporary injunction or from an order denying a motion to dissolve the same within 30 days after entry. Rule 31 of the Supreme Court, and 21 of this court, imposes the further condition where the injunction is granted upon an ex parte application, that a motion "to vacate" shall first be made and the appeal shall be within 30 days from its denial where acted upon or from the seventh day of its presentation where not acted upon. The purpose of the Rules was to give the trial court an opportunity to rectify any mistake that might have arisen out of the ex parte nature of the application. Balaban & Katz Corp. v. Rose, 283 Ill. App. 615; Nichols Illinois Civil Practice Act, Vol. 6, Sec. 6980. Under the Rules defendant may appeal from the order granting an injunction within 30 days after the denial, etc. of his motion to vacate, and under section 78, within 30 days from the order denying his motion to dissolve. Viewing the purpose of the rules referred to and considering that the courts have used the terms, "motion to dissolve" and "motion to vacate" interchangeably (Grossman v. Grossman, 304 Ill. App. 507; Balaban & Katz v. Rose, 283 Ill. App. 615; Chicago Title and Trust Co. v. Provol, 282 Ill. App. 173), we believe we have jurisdiction.

The defendant contends, among other things, that the injunction should not have issued without notice or without bond, since no showing was made that unless the injunction issued without notice, plaintiff would be unduly prejudiced, and no showing made to excuse the giving of the bond; and that the verification of the complaint was faulty. Plaintiff says that the motion to dissolve admitted each and every allegation of the complaint and of the "seven affidavits" in support of the complaint and, therefore, waived the defects. Affidavits should not be filed or considered on a motion for a preliminary injunction in any case. (Dunne v. County of Rock Island, 273 Ill. 53; McNevin v. Stoolman, et al., 235 Ill. App. 449.) We shall not consider them nor any proceeding subsequent to the granting of the injunction but shall judge the order on the pleadings as they existed at the time the order was entered. (Cohen v. Sparberg, 316 Ill. App. 140; Bauer v. Lindgren, 279 Ill. App. 397, 406.) The motion to dissolve directly attacked the issuance of the injunction without notice or bond and, accordingly, preserved the points. Grossman v. Grossman; Negner v. Okner, 306 Ill. App. 601.

The paragraph of the complaint relied upon to justify excusing of the notice is paragraph 27 which alleges that Morris "threatens to remove, sell and convey" the property so as to put it "beyond the reach of the plaintiffs" and "threatens to spend that portion of the \$4500 now in his hands". Section 3 of the Injunction Act, Chap. 69, Ill. Rev. Stats, provides that no injunction shall issue without notice "unless it appears from the complaint or affidavit accompanying the same that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice." There is no allegation when or to whom the threats were made or whether plaintiff feared that Morris would carry out the alleged threats. In brief there are no facts in that paragraph

Preserved the original
v. (1967-1970) v. (1971-1980)
v. (1981-1990) v. (1991-2000)

III .app. 103

The paragraph of the complaint relied upon to justify
excusing of the notice is paragraph 7 which alleges that Morris
"threatened to remove, sell and convey" the property to be sold
it "beyond the reach of the plaintiff" and "threatened to spend
that portion of the \$4500 now in his hands". Section 3 of the
Injunction Act, Chap. 89, Ill. Rev. Stats., provides that an injunction
shall issue without notice "unless it appears from the complaint or
affidavit accompanying the same that the rights of the plaintiff will
be unduly prejudiced if the injunction is not issued immediately or
without notice." There is no allegation when or to whom the threats
were made or whether plaintiff feared that Morris would carry out
the alleged threats. In brief there are no facts in that paragraph

in the complaint or in the affidavit in the complaint, which would justify this extraordinary remedy. Balaban & Katz Corp. v. Rose; Grossman v. Grossman; Wagner v. Okner.

Plaintiff says that because a bond was filed on May 23, 1944, when defendant's motion to dissolve was denied, that any harm suffered by defendant was then cured. We repeat that the question whether the injunction issued improvidently must be determined as of the date it issued. Kessie v. Talcott, 305 Ill. App. 627. The allegation relied upon to excuse the bond is that "the plaintiffs are well-known and financially responsible persons * * *." Section 9 of the Injunction Act provides for bond in injunction cases except where "for good cause shown" the trial court is of the opinion that the injunction should issue without bond. The fact that the order granting the injunction makes a finding that the writ shall "for good cause shown, issue without bond", avails nothing unless cause is shown by the record. Wagner v. Okner. The issuance of an injunction without giving a bond rests largely in the discretion of the court, nevertheless, a sufficient showing must be made on which to base the discretion. Grossman v. Grossman. The fact that plaintiffs may be well-known and financially responsible are not facts showing good cause. To justify excusing the bond on the ground that defendant was secured against loss through the issuance of the injunction, because the plaintiff had sufficient means to respond in damages, (Weinstein v. Levin, 45 N. E. (2d) 891) the complaint or the affidavit supporting the same should contain facts showing the financial condition of the plaintiffs to the extent that a fair inference could be drawn that defendant would be just as well protected as though bond were given. There are no such facts in the complaint or affidavit. The fact that plaintiffs are well-known adds nothing.

in the complaint or in the affidavit in the complaint, which would

justify this extraordinary remedy. Prosser v. Prosser, 100 Cal. 271, 33 P. 2d 1001.

Prosser v. Prosser, 100 Cal. 271, 33 P. 2d 1001.

Plaintiff says that because a bond was filed on May 1, 1944,

1944, when defendant's motion to dissolve was denied, that any

harm suffered by defendant as a result of the denial of the motion

whether the injunction issued against plaintiff was dissolved or

of the date it issued. Prosser v. Prosser, 100 Cal. 271, 33 P. 2d 1001. The

allegation relied upon to excuse the bond is that the plaintiff

is well-known and financially responsible person.

Of the injunction set aside for want of a showing of such ground

where "for good cause shown" the trial court is to determine that

the injunction should issue without bond. Prosser v. Prosser, 100 Cal. 271, 33 P. 2d 1001.

Granting the injunction makes a showing of such ground

good cause shown, leave without bond, as well as setting aside the

shown by the record. Prosser v. Prosser, 100 Cal. 271, 33 P. 2d 1001. The issuance of an injunction

without giving a bond is to be left to the discretion of the court,

nevertheless, a sufficient showing must be made to which to base

the discretion. Prosser v. Prosser, 100 Cal. 271, 33 P. 2d 1001. The court in this case may

be well-known and financially responsible and not set aside setting good

cause. To justify exercising the bond of the court that defendant

was accused against loss through the issuance of the injunction,

because the plaintiff had sufficient cause to rely on in damages,

(Feinstein v. Levin, 48 W. L. (2d) 801) the complaint or the affidavit

supporting the same should contain facts showing the financial

condition of the plaintiff to the extent that a fair inference could

be drawn that defendant would be just as well protected as though

bond were given. There are no such facts in the complaint or affidavit.

The fact that plaintiff is well-known adds nothing.

In the affidavit supporting the complaint the affiant swears that he had read the complaint, knew the contents thereof, and that the same was true "to the best of his knowledge, information and belief." There are no paragraphs of the complaint which are stated to be on information and belief, so that it is impossible to say which paragraphs are true to the best of the affiant's knowledge and which are true to the best of his information and belief. This is sufficient to show the deficiency in the affidavit. Setting aside considerations of other weaknesses in the complaint as basis for an injunction, we have found enough to show clearly that the injunction issued improvidently.

Plaintiff says the defendant has waived all points raised because, following his motion to dissolve, he filed an answer. The complaint in this case was composed of a count in equity praying for an injunction and other relief, and a complaint at law claiming damages. Plaintiff's "motion to dissolve" the injunction had no bearing on the merits of the case. It admitted the facts well pleaded for the purpose of determining whether the injunction should have issued. It did not admit the facts as bearing upon other relief sought. The Injunction Act provides that "a motion to dissolve may be made at any time upon answer, * * *." If defendant had the right to make his "motion to dissolve" as part of his answer, we see no logic in the contention that by making the motion first, he waived the points raised by the subsequent filing of his answer.

For the reasons given the order granting the injunction is reversed.

ORDER REVERSED.

BURKE, P.J. CONCURS.

LEWE, J. TOOK NO PART.

In the affidavit supporting the complaint the plaintiff is aware that he has read the complaint, and the complaint is correct, and that the same was true "to the best of his knowledge, information and belief." There are no allegations of facts which are stated to be on information and belief, but it is necessary to say which paragraphs are true to the best of the plaintiff's knowledge and which are true to the best of his information and belief. This is sufficient to show the plaintiff's belief in the truth of the facts alleged in the complaint. In the complaint the plaintiff is setting aside certain allegations of facts contained in the complaint as being untrue, and he is asking the court to grant him an injunction, to prevent the defendant from doing any act which would be injurious to him, and the information is given in the complaint.

Plaintiff says the defendant has given him notice, because, following his motion to dismiss, he filed an answer. The complaint in this case was composed of a motion to dismiss, asking for an injunction and other relief, and a declaration that the defendant had no damages. Plaintiff's motion to dismiss was filed on the basis of the facts stated in the complaint. It is stated that the facts were stated for the purpose of determining whether the information should have been stated. It did not state the facts as being upon their merits. The injunction was provided that a motion to dismiss may be made at any time upon answer, and it is stated that the right to make his motion to dismiss, as part of his answer, was waived. In the contention that by making the motion first, he waived the points raised by the subsequent filing of his answer.

For the reasons given the other points in the information are reversed.

ORDER REVERSED.

FILED
JULY 10 1964
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

FILED
JUL 7 1945
Stanley B. Brown
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT

May Term, A. D. 1945

Term No. 44014

Agenda No. 13.

ANNA VAN HOOSER,
Plaintiff-Appellee,
vs.
RAY E. FICK,
Defendant-Appellant.

Appeal from the
Circuit Court of
Massac County.

BRISTOW, J.

3261A.593

Anna Van Hooser, plaintiff below and appellee herein will be referred to hereafter as the plaintiff, and Ray Fick, the appellant as the defendant. In December, 1931, the plaintiff was the owner of the real estate involved in this litigation, and also a forty acre tract adjoining the same. The plaintiff built a new home on the forty acre tract and moved into it, and at the same time permitted her son, the defendant, to take possession of the eighty acres. The exact nature of the understanding between the two at the time the defendant was permitted to farm this eighty is the basis of the controversy that developed this appeal.

The plaintiff's position is that her son was told when he moved onto the land in question, that he should keep all taxes paid, pay the insurance on the buildings, and that if he did that he could have for himself all he made on the farm. She contends that there was no definite understanding as to how long he should be permitted to remain there. In January, 1944, the plaintiff decided that she wanted her son to surrender possession, and to that end had served on him a notice to quit within thirty days. Pursuant thereto, on February 19, 1944, she went before a Justice of Peace, filed a complaint, and after a hearing, a judgment for possession of said

premises was entered by said Justice of Peace. From this order an appeal was duly perfected to the Circuit Court of Massac County, Illinois, and after a hearing without a jury, the Court found the issues for the plaintiff, and found that the defendant had been served with a thirty day notice and rendered judgment for immediate possession and cost for the plaintiff. The defendant seeks a reversal of this judgment in this court.

The defendant relates a different version of what was said at the time he took possession of the land in question. He says that his mother told him that if he would move onto the eighty acre tract of land, pay the taxes and keep up the insurance, at her death the premises would be his. Immediately the son says he accepted his mother's offer, took possession of the land, has paid all the taxes and insurance, and that during the twelve years preceding the present controversy made permanent improvements consisting of the following: reroofed the house, built more than a mile of fencing, cleared and straightened the fields, built an all weather road, also built a new flue and concrete steps, and also built a barn, garage smokehouse and toilet. The defendant contends that in view of the foregoing facts he was not a mere tenant at will, but that he was holding possession as a promisee or vendee under a contract for a purchase of the real estate in question; and that he had complied with all the terms of the contract under which he acquired possession, and that such compliance constituted a complete defense to his mother's claim for possession. The defendant further contends that since his possession was predicated upon a contract for the purchase of the premises, the mere giving of a thirty day notice did not give the court jurisdiction. In support of this proposition, the defendant cites sections two and three of the Fifth clause of Chapter 57, Revised Statutes of the State of Illinois. If the plaintiff is correct in her contention that the defendant was a tenant at will then the above quoted sections do

not apply. Let us therefore advert to the record and briefly detail the testimony offered on the trial below.

The plaintiff when asked under what circumstances her son moved onto the farm said, "Well, I felt that he needed a comfortable place for his family, and I fixed the place up as comfortable as I could, under the circumstances, and I told him that if he would pay the taxes, the insurance and take care of the place, he could have what he made, and I felt that he could have the place, but he was so cruel to the family that they left him." Motions to strike the latter part of the answer were sustained. This questioning also appears:

"Q. And at the time he moved onto the place was there any understanding just as how long he should stay there?

A. No, sir.

Q. Was it an indefinite time that he should stay there?

A. Yes."

On cross examination of the plaintiff the following appears:

"A. Was there or was there not an agreement if he would go on to the premises and pay the taxes, keep up the insurance, take care of the premises, he could have it?

A. I didn't say he could have it, I said he could have what he made off of it.

Q. He would have that anyway, wouldn't he? I am asking you if he wasn't to have the premises if he did that?

A. Circumstances alter cases.

Q. I am asking you what took place at that time?

A. I don't remember exactly what were the words, but I told him that he could have what he made if he did that.

Q. But you didn't tell him he could have the farm if he did that?

A. I didn't give it to him, no.

Q. I will ask you, Mrs. Van Hooser, if it wasn't the understanding

when he went there that he was to have this place and that the sister was to have another forty acres of land and five hundred dollars? Refresh your recollection now and see if that isn't right.

A. It was agreed it should be divided that way, but I sold the other forty and probably things should be arranged now, and I feel very much alive and decided I can take care of my own business.

Q. At that time that was the arrangement wasn't it, that the girl was to have the forty acres and five hundred dollars and Ray was to have the eighty acres at your death?

A. I am not dead yet.

Q. I am not talking about that, but I am asking you if that wasn't the arrangements?

A. Yes, we agreed to that, but I never made anything else.

Q. Now, if I understand you -- the Court wants to know the truth about it and so do you, you claim that Ray was to have the eighty acres if he went on and paid the taxes and took care of it, he was to have the eighty acres at your death and that the daughter was to have forty acres and five hundred dollars at your death, and that was the understanding at that time in effect?

A. We agreed to these things."

On redirect examination of the plaintiff, the following appeared:

"Q. And it was talked over that that would be the way the property would be divided at your death?

A. Yes, sir.

Q. But now you have sold the forty acres, so it would be impossible to divide it that way, wouldn't it?

A. It looks that way to me."

The direct examination of the defendant reveals the following:

"Q. You heard Mrs. Van Hooser testify as to the arrangements made at the time you went into possession of this land?

A. Yes, sir.

Q. Now did you understand her to say that at the time you was to have the eighty acres of land and your sister was to have the forty acres and five hundred dollars at the death of your mother?

A. That was the arrangement."

It appears from the foregoing that the plaintiff in no less than five places said that she did not intend to give her son the eighty acres by virtue of his moving onto the place and paying the taxes and insurance. Being further pressed on cross examination she did admit that there was some understanding that her son was to receive the eighty upon her death and her daughter was to receive the forty and five hundred dollars. The trial court seeing and hearing the mother and son testify was in a much better position than we in attaching meaning and weight to their words.

The court could very reasonably believe the plaintiff's version of the arrangements by which her son became possessed of her eighty acres. She said that he could have what he made off of the farm if he paid the insurance and taxes. Surely this cannot be construed to be a contract for purchase but is merely a tenacy at will. Moore's Civil Treatise, Fourth Edition Vol 2 Section 1622. If the defendant has any rights they are of an equitable nature. Herrell vs. Sizeland, 81 Illinois 457, and Cross vs. Campbell, 89 Illinois App. 489.

We are of the opinion that the findings of the trial judge are not against the manifest weight of the evidence. We appreciate the fact that the plaintiff's testimony may be interpreted two different ways, - one indicating a factual situation supporting the Defendant's theory of defense, the other sustaining plaintiff's claim for possession. A trial court has so many more opportunities of evaluating testimony than a reviewing court, that where there is any reasonable basis for his findings they should not be disturbed.

In view of the foregoing we are of the opinion that the judgment of the court below should be and the same is affirmed.

JUDGMENT AFFIRMED.

43394

FRANCIS A. ADAMAITIS,
Appellee,

v.

HENRY A. GARDNER, Trustee for the
Alton Railroad Company, a Corporation,
Appellant.

A FILE FROM
SUPERIOR COURT,
CITY OF CHICAGO.

MR. PRESIDING JUSTICE ALTON D. LIVINGSTON OF THE COURT.

Plaintiff, of a switching crew in the service of the Alton Railroad Company, was on April 19, 1944, at about 1:40 A.M., injured in an operation in the Harrison Street yards of the railroad in Chicago. He sued under the Federal Employer's Liability Act, alleging that at the time of the injury he was exercising due care while the railroad was negligent in several ways, designated as a, b, c, d, e, and f, resulting in injury to him.

The complaint was amended to make Gardner, as Trustee for the railroad company, defendant. The cause was put at issue and tried by jury. There was a motion by defendant at the close of all the evidence for a directed verdict in his favor, denied.

The jury returned a verdict of guilty, assessed damages at the sum of \$3,000. 00, and in answer to interrogatories replied that the switch was not in a reasonably safe condition at the time of the accident; that the activity in which plaintiff was engaged directly, closely and substantially affected Interstate Commerce, and that the sole, proximate cause of the accident was not due to the manner in which the plaintiff threw the switch.

The defendant moved to set aside the findings of the jury and its verdict and for a new trial. Plaintiff remitted

FRANCIS A. WATKINS,

Attorney at Law,

v.

ALTON RAILROAD COMPANY, Plaintiff,
vs.
ALTON RAILROAD COMPANY, Defendant.

MR. PRESIDENT, JURY:

Plaintiff, of Alton, Illinois, by its Attorney, Francis A. Watkins, does hereby move for a judgment in its favor for the sum of \$5,000.00, and for its costs.

Defendant, in answer to the motion of Plaintiff, does hereby move for a judgment in its favor for the sum of \$5,000.00, and for its costs.

Of the railroad in question, the defendant does hereby move for a judgment in its favor for the sum of \$5,000.00, and for its costs.

Plaintiff, by its Attorney, Francis A. Watkins, does hereby move for a judgment in its favor for the sum of \$5,000.00, and for its costs.

exercising due care while the railroad was in its possession and control.

ways, designated as a, b, c, d, e, and f, resulting in injury to

him.

The complaint was returned to the court on the 1st day of

for the railroad company, defendant. The court has not yet

issue and tried by jury. There has been no verdict or judgment at

the close of all the evidence for a judgment in favor of the

favor, denied.

The jury returned a verdict of \$5,000.00, and for its costs.

at the sum of \$5,000.00, and for its costs to the plaintiff.

replied that the railroad was not in a reasonably safe condition

at the time of the accident; that the activity in which plaintiff

was engaged directly, closely and substantially affected

Interstate Commerce, and that the sole, proximate cause of the

accident was not due to the manner in which the plaintiff threw

the switch.

The defendant moved to set aside the findings of the

jury and its verdict and for a new trial. Plaintiff remitted

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from the verdict all in excess of \$750.00, whereupon the court denied a motion of defendant for judgment notwithstanding the verdict/^{or} for a new trial, and entered judgment for plaintiff against defendant for the sum of \$750.00, from which defendant appeals.

It is contended for reversal that the motion for a directed verdict should have been granted as defendant was not guilty of any negligence; that the verdict is against the manifest weight of the evidence, that the verdict was the result of passion and prejudice, which the remittitur did not cure; and that the trial court erred in giving plaintiff's instructions Nos. 8, 9, 10, and 11.

We hold the court did not err in submitting the issues to the jury. This is a federal question. A request for such an instruction searches the record for evidence to support a denial thereof. Hartford Accident and Indemnity Co. v. Carter, 110 Fed. (2nd) 355, 357, followed by Spiering v. C. & E. I. R. Co., 325 Ill. App. 576, Brady v. Southern Ry. Co., 320 U. S. 476, 479; Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 352.

The plaintiff's charges of negligence in the complaint were that the switch was allowed to become in a sticky or defective condition; of which defendant had, or should have had, knowledge, and that a pillar erected at a position near to the switch, made it difficult for the switchman to perform his service without danger. The gist of the complaint is that defendant was negligent in failing to furnish plaintiff with safe appliances with which to work and a safe place to work in. Several breaches of duty were charged. One that the switch was maintained too close to the pillar at the place where plaintiff was injured, making it difficult to throw the switch in the usual way; that the switch was in a sticking condition as a result of accumulation of sand, etc., and that as maintained

[illegible]

The following cases are cited in the report:
 1. United States v. Smith, 100 F.2d 100, 101 (9th Cir. 1936).
 2. United States v. Smith, 100 F.2d 100, 101 (9th Cir. 1936).
 3. United States v. Smith, 100 F.2d 100, 101 (9th Cir. 1936).
 4. United States v. Smith, 100 F.2d 100, 101 (9th Cir. 1936).
 5. United States v. Smith, 100 F.2d 100, 101 (9th Cir. 1936).
 6. United States v. Smith, 100 F.2d 100, 101 (9th Cir. 1936).
 7. United States v. Smith, 100 F.2d 100, 101 (9th Cir. 1936).
 8. United States v. Smith, 100 F.2d 100, 101 (9th Cir. 1936).
 9. United States v. Smith, 100 F.2d 100, 101 (9th Cir. 1936).
 10. United States v. Smith, 100 F.2d 100, 101 (9th Cir. 1936).

result of accumulation of sand, etc., and that as maintained usual; that the switch was in a sticking condition as a was injured, making it difficult to throw the switch in the maintained too close to the pillar at the place where it difficult several breaches of duty were observed. That the switch was appliances with which to work and a safe place to work in. defendant as negligent in failing to furnish plaintiff with safe his service without danger. The gist of the case is that to the switch, made it difficult for the plaintiff to get had, knowledge, and that a pillar erected at the switch in a defective condition; of which he was told, or should have known that the switch was injured to such an extent that

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there was not sufficient room for clearance between the ball^{of the lever} of the switch and the ground upon which the ball rested. There were other charges of negligence not claimed, to be proved. A plat of the switch is in evidence. It shows the tracks and the pillar and the situation accurately. Plaintiff was not required to prove all the allegations of the complaint.

The evidence tended to show that at the time of his injury plaintiff was thirty-five years of age. He had been employed by the railroad as a switchman for some years and for the larger part of the time worked at the Glenn and Brighton Park Yards of the railroad in Chicago. The railroad tracks in these yards ran east and west, curving northeast to the Harrison Street Yard, where the accident happened. The Harrison Yard extends from Folk Street to the Union Depot. The tracks run generally north and south.

On the night before the accident plaintiff reported for work at Brighton Park at 11:30 P. M. to his conductor, Robert Gombas. Other members of the crew were a fellow switchman, Fred Kolze, an engineer, McGifford, and a fireman, Quinnan. A train of cars was built up, taken down town on the main line to Harrison Street and switched to the No. 1 track there. The train consisted of over fifty cars. In the course of the work it became plaintiff's duty to close a switch located in a quite dark place. There were buildings, driveways and a ramp there, all supported by pillars. Plaintiff says it was 3:40 A. M., and that smoke from the engine obscured vision. The overhead structure made "sort of a tunnel" from north to south, about 150 feet long. The switch was about 50 feet from the south end of the tunnel. The overhead structures were supported by reinforced concrete columns, one of which was right next to the switch. The part of the column on the ground was about 4 or 5 feet long and 1 1/2 feet thick. It ran

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parallel to the tracks. The switch connected No. 1 track with the lead track. The base of the column paralleled the No. 2 or lead track. The switch stand was right at the corner of the pillar, east of the track, about 6 inches north and 1 foot west of the pillar. The switch was a ball and lever type. The lever was about 2 feet long with a big ball, weighing about 25 pounds, on the end of it. When the ball was over to the north, the switch was open for No. 1 track. To close the switch so traffic could come down the lead track without going over No. 1, it was necessary to throw the ball from the north to the south. There were about 150 of the same type of switches in the different yards of the railroad. The switch stand was bolted to the south tie, so that when the switch lever came down, it was level with the upper base or the ground. The switches were generally from 4 to 6 inches above the level of the ground. Plaintiff says, however, on this particular switch there was no clearance between the ball and the ground. The ball rested on the ground. On the other switches, where the ball was over the switch, the bottom of the ball was 4 to 6 inches from the ground underneath.

Plaintiff approached the switch and put his right foot on the trigger to release the arm of the switch. He stood in the usual position and put his left foot against the pier. He says: "Normally it went up easily. This time it came up about a third of the way and it stuck there. I gave it a little more effort and when it would not come I gave it a good pull and it came all at once and came out of my hand and came down on my foot. When the handle went out of my hand I slipped on the gravel and that put my right toe under the ball. I slipped on pea gravel. When my foot slipped the ball landed on my toe. Before I slipped my foot was in a position where the ball would not have hit it."

Plaintiff says that the switch was too close to the pillar;

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... on the ... "Normally it ... of the ... and when it ... at once and ... the handle went ... but my right ... my foot slipped ... my foot was in ... Plaintiff says that the switch was too close to the ...

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that the lever was defective, in that it stuck; that gravel and cinders made the footing insecure, and that the lack of clearance between the ground and the ball of the lever was the cause of the accident.

Defendant says plaintiff only attempted to prove negligence in two respects; namely, that the switch was defective or stuck, and that the ballast was level with the ties. He analyzes the evidence as to each of these charges and cites cases, which it is argued, hold as a matter of law that similar evidence was insufficient.

As to the sticking condition of the switch, it is said this was insufficient without proof of notice of this defect to defendant. On this point defendant cites Huff v. Illinois Central R. R. Co., 362 Ill. 95, 101; Patton v. Texas & Pac. Ry. Co., 179 U. S. 658, and New York Central Railroad Co. v. Ambrose, 280 U. S. 486, 489. With other cases he cites Matthews v. Southern Pacific Co., 15 Cal. App. (2d) 36, 50 Pac. (2d) 220, said to be closely analogous to the instant case.

Cases are also cited holding it is not negligence to ballast to the top of the ties, such as Devine v. Calumet R. R. Co., 259 Ill. 449, 459; Lake Erie & Western R. R. v. Morrissey, 177 Ill. 376; Illinois Central Railroad Co. v. Sanders, 166 Ill. 270, 278, and many similar cases.

These are not applicable here. There were some charges of negligence with proof tending to show them without contradiction. The circumstances of each case must be considered. It might well be under the particular circumstances in the cases cited, it was not negligence to ballast to the top of the ties. It does not follow it must be so held under all circumstances, particularly such as appear in this case. It might well be negligence under one set of circumstances ^{not} to ballast to the top of the ties, while under other circumstances it would be

that the lever was defective, in fact it was not; and indeed made the footing in court, and the fact of clearance between the ground and the lever was the cause of the accident.

Defendant says plaintiff only needed to know negligence in two respects; namely, that the defendant or struck, and that the plaintiff was negligent. It analyzes the evidence as to each of these matters, and shows that it is wrong, hence the verdict of a jury that evidence was insufficient.

As to the standard of care, it is said that this was insufficient without proof of notice of defect to defendant. On this point the court in Central R. Co. v. R. Co., 388 Ill. 94, 101; Ill. v. R. Co., 179 U. S. 658, and New York Central R. Co. v. Johnson, 230 U. S. 438, 439, with other cases has held that

Southern Pacific Co. v. Johnson, 13 Cal. App. 2d 100, 101, is said to be closely analogous to the instant case. Cases are also cited holding it is not negligence to

ballast to the top of the ties, such as Ill. v. Johnson, 179 Ill. 449, 453; Lake Erie R. Co. v. Johnson, 177 Ill. 376; Illinois Central R. Co. v. Johnson, 103 Ill. 270, 278, and many similar cases.

These are not applicable here. There were some cases of negligence with proof tending to show that slight contribution. The circumstances of each case must be considered. It might well be under the particular circumstances in the cases cited, it was not negligence to ballast to the top of the ties. It does not follow it must be so held under all circumstances, particularly such as appear in this case. It might well be negligence under one set of circumstances to ballast to the top of the ties, while under other circumstances it would be

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negligence to do so. This creates an issue for the jury.

The language of Mr. Justice Douglas at page 352 of the Bailey case, 319 U. S., seems to be appropriate.

"The rights which the Act creates are federal rights protected by federal rather than local rules of law * * *. And those federal rules have been largely fashioned from the common law * * * except as Congress has written into the Act different standards. At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain * * *. The rule is deeply engrained in federal jurisprudence * * * Patton v. Texas & Pac. Ry. Co., 179 U. S. 658. As stated by this court in the Patton case, it is a duty which becomes more imperative as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care --- reasonableness depending upon the danger attending the place or the machinery.' * * *. It is that rule which obtains under the Employers' Liability Act."

The controlling questions under the pleadings here are, whether the instrumentalities furnished by the railroad to plaintiff were reasonably safe, whether the plaintiff was furnished a safe place in which to work, and whether there was negligence in this respect which caused the accident and injury. These were, we hold, questions for the jury.

It is also contended the verdict is against the manifest weight of the evidence. It is said the narrations of the manner in which the accident occurred by plaintiff are inconsistent in many ways. Defects of memory in the average human are such that a skillful lawyer on cross-examination will usually be able to bring out statements from which, later, inconsistencies or omission to tell all the truth may well be argued. We have read the evidence as it appears in the abstract and think the credibility of the witnesses was for the jury, and that we ought not to disturb its verdict.

It is also argued that the verdict was so excessive as to indicate passion and prejudice on the part of the jury. There

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research. It also provides a brief overview of the methodology used in the study.

[illegible]

It is also argued that the verdict is to indicate passion and prejudice on the part of the jury. There is no evidence in the record to support this claim. The evidence is not so circumstantial as to require a jury to find that the defendant was guilty of the crime charged. The evidence is direct and uncontradicted. The jury's verdict is not to disturb its verdict.

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was nothing in the facts of the case or in the manner of its trial that should have aroused such prejudice. However, the amount of the verdict led the trial court to the conclusion (with which we agree) that three-fourths of it ought to be remitted. This might cure the verdict if the amount of it was the only alleged error. The case, however, was fairly close on the facts, and the defendant is entitled to a trial by an unprejudiced jury on all these. There is a line of cases in this state holding that a verdict like this, in such a case, cannot be cured by remittitur. Loewenthal v. Strens, 80 Ill. 74; Gleason v. M. F. Byrne Construction Co., 172 Ill. App. 359; Richter v. Fegtmeyer, 167 Ill. App. 473; Chicago & North-western Ry. Co. v. Cummings, 80 Ill. App. 332, and Olsen v. North, 276 Ill. App. 457. On this point no Federal authority is cited by either party.

It is next urged instructions given at the request of plaintiff were erroneous. Complaint is made of plaintiff's No. 8, which told the jury plaintiff was entitled to a verdict if he had proved defendant was guilty of negligence, as charged in the complaint or some paragraph of it, and that the negligence was the proximate cause of his injuries. Defendant says this authorized a verdict for plaintiff under paragraph 5 (b) and 5 (f) of the complaint, of which latter there was no proof whatever. The instruction is subject to criticism in this respect, although we doubt whether it could have misled the jury. It is also said the instruction was erroneous in omitting the essential requirement of interstate commerce. Avance v. Thompson, 387 Ill. 82, Cert. denied 65 Sup. Ct. 82, is cited. The fact that the parties here were engaged in interstate commerce was admitted by defendant's answer, established by undisputed evidence and found by the jury to be a fact in reply

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to a question submitted at defendant's request. It was also found to be a fact in reply to a special interrogatory given at the request of defendant. We hold the instruction was not erroneous for the reasons stated.

Plaintiffs instruction No. 11, which is in the language of the statute, is objected to. The objection was sustained in Spiering v. Chicago & Eastern Ill. R. Co., 325 Ill. App. 476. It may or may not be erroneous to give it. We think it should not have been given under the particular circumstances disclosed by the evidence in this case.

For the reasons indicated the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor and Niemeyer, JJ., concur.

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to a question submitted at the hearing, the witness also found to be a fact in truth, and given at the request of the court, and was not erroneous for the reasons stated.

Exhibit 1, in connection with the testimony of the witness, is submitted as evidence.

in Exhibit 1, which is a copy of the letter from the witness to the court, it is stated that the witness should not have been asked to testify, and the court should have been informed of this by the evidence in the case.

For the reasons stated, the court finds that the witness should not have been asked to testify.

and the court remanded the case to the court.

O'Connor and Hines, J., concur.

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EMMONS C. CARLSON,
Appellant,
v.
IRNA PHILLIPS,
Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff, claiming a half interest in a radio serial show - The Guiding Light, originally named The Good Samaritan - licensed in December 1936 to Proctor & Gamble through the Blackman Advertising, Inc., New York (hereafter called the Agency), and broadcast over a 48-station network of the National Broadcasting Company (N. B. C.), brought suit for an accounting against defendant as owner of the remaining half interest. The master found for plaintiff. The trial judge sustained exceptions to the master's report and dismissed the complaint for want of equity. Plaintiff appeals.

His suit is based on an oral agreement for an equal division of profits, alleged to have been made in September 1936, following an oral agreement in the preceding March or April to collaborate in writing the script for a show combining plaintiff's ideas on the problems of a melting pot community and defendant's outline for a show entitled The Good Samaritan, built around a minister and his daughter.

He claims and the master substantially finds that he skillfully and competently prepared a presentation (a sales prospectus, giving information about the author, an analysis of the characters of the show, the general theme of the show, the reasons why it should have audience appeal, etc.) an

WILSON C. DALLON, Appellant,

v.

IRMA PHILLIPS, Appellee.

APPEAL FROM
CIRCUIT COURT
GOOD COUNTY.

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, claiming a half interest in a radio show - the "Outing Light", originally named "The Good Samaritan" - licensed in December 1935 to Weston & Garfield through the Blackman Advertising, Inc., New York (hereafter called the Agency), and broadcast over a 48-station network of the National Broadcasting Company (N.B.C.), brought suit for an accounting against defendant as owner of the remaining half interest. The master found for plaintiff. The trial judge sustained exceptions to the master's report and dismissed the complaint for want of equity. Plaintiff appeals.

His suit is based on an oral agreement for an annual division of profits, alleged to have been made in September 1936, following an oral agreement in the preceding March or April to collaborate in writing the script for a show combining plaintiff's ideas on the problems of a melting pot community and defendant's outline for a show entitled "The Good Samaritan", built around a minister and his daughter.

He claims and the master substantially finds that he skillfully and competently prepared a presentation (a sales prospectus, giving information about the author, an analysis of the characters of the show, the general theme of the show, the reasons why it should have audience appeal, etc.) and

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audition script (a script or text for a 15 minute episode with flashes - short scenes of future action or plot development - to be produced as if broadcast over the air for a prospective sponsor) which were submitted to the Agency in the sale of the show; that when it appeared likely that a sale would be made, defendant entered upon a course of conduct designed to disregard plaintiff's interest in the show and to claim it and all profits arising out of its sponsorship as her own; that she failed and refused to cooperate with plaintiff in the preparation of scripts or the preparation of daily plots, making it impossible for plaintiff to prepare scripts to fit into the serial continuity of the show; that misrepresenting the amount she was receiving (the contract with the sponsor having been entered into in her name and all payments thereunder having been received by her), she paid him a total sum of \$2,000, purporting to be his one-half of the profits, \$100 a week from the first broadcast, January 25, to June 7, 1937; that thereafter she refused to recognize any interest of plaintiff in the show or to make any further payments to him.

Defendant claims the show as her sole property. She admits that plaintiff prepared and delivered to her the presentation and audition script, but says in her sworn answer that "plaintiff did so not as a partner of defendant or as a joint adventurer with her and not even as defendant's servant or employee actually hired by defendant as of the time of said delivery; that said delivery was made by plaintiff and accepted by defendant with the understanding that if defendant was pleased with plaintiff's work, she would hire him as her employee; that plaintiff had had no previous experience in the business of writing radio scripts and that he had applied to defendant to become her apprentice in order that he might learn the art of writing radio scripts. In consequence whereof, the presentation

of writing radio scripts. In consequence whereof, the presentation to become her apprentice in order that he might learn the art of writing radio scripts and that he had applied to defendant that plaintiff had had no previous experience in the business with plaintiff's work, she would hire him as her employee; by defendant with the understanding that if defendant was pleased delivery; that said delivery was made by plaintiff and accepted or employee actually hired by defendant as of the time of said joint adventurer with her and not even as defendant's servant that "plaintiff did as not as a partner of defendant or as a presentation and audition script, but says in her own answer admits that plaintiff prepared and delivered to her the Defendant claims the show as her sole property. She show or to make any further payments to him. after she refused to recognize any interest of plaintiff in the the first broadcast, January 25, to June 7, 1937; that there- purporting to be his one-half of the profits, \$100 a week from been received by her), she paid him a total sum of \$2,000, entered into in her name and all payments thereunder having she was receiving (the contract with the sponsor having been serial continuity of the show; that misrepresenting the amount impossible for plaintiff to prepare scripts to fit into the tion of scripts on the preparation of daily plots, making it failed and refused to cooperate with plaintiff in the prepara- profits arising out of its sponsorship as her own; that she plaintiff's interest in the show and to claim it and all defendant entered upon a course of conduct designed to disregard show; that when it appeared likely that a sale would be made, sponsor) which were submitted to the Agency in the sale of the to be produced as if broadcast over the air for a prospective with flashes - short scenes of future action or plot development - audition script (a script or text for a 15 minute episode

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and audition script referred to above were so inartificially prepared that it was necessary for defendant to make so many revisions in the same as to amount to a totally new and different presentation and audition script."; that after the sale (notwithstanding her claim of plaintiff's alleged incompetency) she employed him under an oral agreement to write script for the show at \$100 a week, but discharged him in June 1937 after paying him \$2,000 because "he was either unable or unwilling to write scripts of satisfactory quality and quantity and thus abandoned all-efforts to perform his duty in that regard." On the trial she testified that plaintiff was very willing to write but did not seem able to.

In 1936 plaintiff was, and since October 1930 had been employed by N. B. C. at Chicago as advertising and sales promotion manager, in which capacity he prepared and wrote, and had prepared and written under his supervision, speeches, articles for trade papers, material for advertising and direct mail campaigns and several thousand presentations used in the sale of radio time and radio programs owned by the company or being sold by it as agent; he had written 3 or 4 radio scripts but none had been put on the air; he was a member of the N. B. C. program planning board, which heard auditions and appraised shows written for the company or submitted to it for sale to sponsors. Defendant was engaged in writing, producing and acting in radio shows; she began writing and acting in 1930; before the sale of The Guiding Light in December 1936, Today's Children was the only serial on a network that defendant had produced or had anything to do with - the only show she had sold to a sponsor; this show was "substantially the same serial or drama" as Painted Dreams, which defendant attempted unsuccessfully to claim as her own. (Phillips v. W. G. N. Inc., 307

and audition script referred to above were so identified, prepared that it was necessary for defendant to make a revision in the same as to amount to a totally new and original presentation and audition script." That after the sale (notwithstanding her claim of plaintiff's alleged incompetency) she employed him under an oral agreement to write and produce the show at \$100 a week, but discharged him in June 1936 after paying him \$2,000 because "he was either unable or unwilling to write scripts of satisfactory quality and quantity and to abandon all efforts to perform his duty in that regard." On the trial she testified that plaintiff is very willing to write but did not seem able to.

In 1936 plaintiff was, and since October 1936 has been employed by R. B. B. of Chicago as advertising and sales promotion manager, in which capacity he prepared and wrote, and had prepared and written under his supervision, he also, exclusively for trade papers, material for advertising and direct mail campaigns and several thousand translations used in the sale of radio time and radio programs owned by the company or being sold by it as agent; he had written 5 or 6 radio scripts but none had been put on the air; he was a member of the R. B. B. program planning board, which board auditioned and selected shows written for the company or submitted to it for sale to sponsors. Defendant was engaged in writing, producing and acting in radio shows; he began writing and acting in 1936; before the sale of The Guiding Light in December 1936, Today's Children was the only serial on a network that defendant had produced or had anything to do with - the only show she had sold to a sponsor; this show was "substantially the same serial or drama" as Painted Dreams, which defendant attempted unsuccessfully to claim as her own. (Phillips v. B. B. B., Inc., 307

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Ill. App. 1, 7.) Today's Children was sold through N. B. C. in the fall of 1932 and remained on the air until January 1938; May 31, 1934 defendant advised N. B. C. that Walter Eicker had collaborated with her in producing Today's Children and had a one-fifth interest in the program under a verbal agreement, the terms of which do not appear in the record; this interest was terminated July 14, 1936; in 1936 Today's Children was the leading daytime serial (soap opera) on the air; N. B. C. was paying \$1,350 a week for it; defendant was furnishing the scripts, acting the part of the principal character, Mother Moran, and producing the show as a package production (the show complete - program, talent and staging); this netted her something like \$700 a week. In addition to Today's Children defendant had written some of the script for the advertising agency handling The Little Church Around the Corner, a local show on the air 26 weeks. On her own behalf she had written Ma Brown's Patchwork Quilt, which had appeared locally; Masque which had been on the air locally as a sustaining show (a show produced by the broadcasting company without a sponsor), and two day-time serials - Black Earth and Dear Diary - neither of which had appeared on the air. Black Earth had been in the hands of N. B. C. and the Agency, but no sponsor for it had been procured. Dear Diary, placed with the Agency, was withdrawn in October 1936 as not being up to standard.

Plaintiff and defendant had known each other several years. Defendant says that she used to stop at his office practically every day after the Today's Children broadcast, and they were "pretty friendly." Plaintiff testified that in the early part of 1936 he told defendant that he thought there was material for an excellent series of scripts built around a melting-pot community like Ogden, Milwaukee and Chicago

1711. App. 1, 2. Today's Children was sold through the
in the fall of 1955 and running on the air until 1956.
1958; May 31, 1956 defendant advised that the children
had collaborated with her in production of the children's
had a one-fifth interest in the program until a recent agreement
the terms of which he was unable to recall. This program
was terminated July 15, 1956; in 1956, defendant said that
leading daytime serial "Love, Honor and the Heart" was
paying \$1,350 a week for it; defendant was producing the
night, acting the part of the principal character, Helen
Loren, and producing the show as a package production. The show
complete - program, talent and standing; it was her sole-
thing like \$700 a week. In addition to her children
defendant had written some of the scripts for the advertising
agency handling The Little Church Around the Corner, a local
show on the air in 1956. She has not heard the show since
a woman's "Fathom's Gift", which had received a rating of 10
which had been on the air locally as a radio show and
produced by the broadcasting company without a contract, and
day-time serials - "Black Earth and Deep Water" - which of
which had appeared on the air. "Black Earth and Deep Water"
hand of H. J. and the Agency, but no contract fee is in
been produced. "Deep Water", along with the "Love, Honor and
drawn in October 1956 as not being an standard.
Plaintiff and defendant had known each other several
years. Defendant says that she used to work at his office
practically every day after the today's Children program, and
and they were "pretty friendly." Plaintiff testified that in
the early part of 1956 he told defendant that he would like
was material for an excellent series of short, to build around
a waiting-hot community like Ogden, Milwaukee and Chicago

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avenues in Chicago (called the Five-points in the Guiding Light) to keep going for years; that defendant agreed and suggested that they collaborate in writing the scripts for a show combining plaintiff's melting-pot with the Good Samaritan -- a show about a minister and his daughter which defendant had outlined; that defendant gave him a two-page outline of The Good Samaritan taken from her files and, after a discussion as to the development of the plot, he wrote the opening script and delivered it to the defendant, who arranged for its audition by N. B. C. in April; that plaintiff did not disclose his connection with the script because he wanted it judged on its merits, unaffected by office jealousies. Defendant testified that on various occasions plaintiff had spoken of his dissatisfaction with his position at N. B. C. and said he would give anything in the world if he could write for radio, and would be very grateful if defendant would only show him what she was doing; that in February or March 1936 she told him she would be only too glad to teach him; and sent him the outline of the Good Samaritan; that in the discussion of the development of the outline plaintiff suggested placing the characters in a melting-pot community and starting the show with a Swedish family and its problems; that defendant assented, and plaintiff wrote the script, which was auditioned, without any change, by the N. B. C. planning board in April. The board appraised it as a "good show, but formula very close to a program submitted some time ago by Gene Arnold"; ~~that~~ it was taken in stock for sale by N. B. C. until May 4, when N. B. C. decided that it would not audition to other accounts The Good Samaritan, Masquerade and Black Earth, submitted by defendant, because she had signed an exclusive contract with the sponsor of Today's Children. Plaintiff testified that a few days after the audition he suggested to defendant making changes in the script, and was told to go

avenue in Chicago (called the five-point in the Chicago
light) to keep going for years; that defendant turned and
suggested that they collaborate in writing a picture for a
now coming plaintiff's picture with the idea of making a
show about a minister and his daughter which defendant had
outlined; that defendant gave him a two-page outline of the
plot of defendant taken from the film and after a discussion
as to the development of the plot, he wrote the outline which
and delivered it to the defendant, who returned for the picture
by M. B. in April; that plaintiff did not discuss the
connection with the script until a few days after the picture
was written, reflected by the defendant's refusal to discuss
that on various occasions plaintiff had a look at the
discussion with his position at the time and only to write
give anything in the world if he could write the picture, and
would be very grateful if defendant would give him the
one as copy; that in February or March 1935 he told him
she would be only as close to seeing him; that he told him
outline of the good defendant; that in the discussion of the
development of the outline plaintiff suggested changes in
character in a well-known community and stating that he
a Swedish family and the problem; that defendant suggested, and
plaintiff wrote the script, which was additional, with the
change, by the M. B. planning could in April. The board
appraised it as a "good show, but formula very close to a picture
submitted some time ago by Gene Smith"; XXXX it was then in stock
for sale by M. B. until May 4, when M. B. decided that it
would not addition to other accounts the good defendant's suggestions
and Black Earth, submitted by defendant, because she had signed an
exclusive contract with the sponsor of today's defendant. Plaintiff
told testified that a few days after the audition he suggested
to defendant making changes in the script, and was told to go

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ahead and that it would be a good idea to project the story for each character; that shortly afterwards he told defendant that he was ready to submit the script and projection of characters, but she replied that she was not feeling well and was going to the hospital; that he did not submit them to her until September - that in the meantime there had been no nibbles of any kind on the show. Defendant went to the hospital in May and remained there 5 or 6 weeks. She testified that while she was in the hospital, and later in July or August, plaintiff said he would like to go back to The Good Samaritan "to see if we cannot do a little bit more with it. I would really like to get a little more writing experience"; that she told him she wanted to take a vacation and did not know when she would get back to the show; that the first part of September she told plaintiff she was going to New York and said, "If you want to write, why don't I present this (The Good Samaritan) in New York on my way to South America";--that Taylor of the Agency said he would be interested in any ideas she might have: "We don't have any client that I know of, but anyway it is a shot in the dark. If anything happens out of it, fine, and it will give you a chance to write"; that she asked him to make up a presentation and also mentioned certain changes that were to be made in the audition script, but could not pick them out; that she got the script with the changes when she got the presentation, but never discussed the changes with plaintiff; that she objected to the presentation as being "way, way too elaborate," and that she didn't believe it was a good idea to toot one's horn in submitting a play to the Agency; that plaintiff said it was promotional work and what they (N. B. C.) had done on hundreds of presentations; that she had no quarrel with that; that Taylor and McMillan, head of the radio department of the Agency, thought that the presentation was a very well done

agreed and that it would be a good idea to project the thing
for each character; that should be the dominant
that he was ready to submit the script and production of
characters, but she replied that she was not ready to
was going to the hospital; that he had not been there
until September - that in the hospital there were
ribbles of any kind on the roof, therefore not to be
hospital in any and remained there for a week or so
that while she was in the hospital, and later in the
plaintiff said he would like to see the script
"to see if we cannot do a little bit more with it. I would
really like to see a little more of the script; but she
told him she wanted to take a vacation and did not want
she would not have to do that; that the first part of the
she told plaintiff she was going to do it, "I'll
want to write, my son's a writer. (The word "writer" is
to work on my way to South America; that Taylor of the agency
said he would be interested in any more of it; that
don't have any client that I know of, but I would like to do a story
in the book. If anything comes out of it, I'll be all
give you a chance to write; that she would like to see the
presentation and also mentioned certain changes that had to
be made in the audition script, and could not wait then;
that she got the script with the changes when she got the pre-
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elaborate," and that she didn't believe it was a good idea to
foot one's horn in submitting a play to the agency; that plain-
tiff said it was promotional work and what they (i.e., he) had
done on hundreds of presentations; that she had no quarrel
with that; that Taylor and Holliman, head of the radio department
of the agency, thought that the presentation was a very well done

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job and had sent it on to the client. Plaintiff testified that about September 10 defendant said she had told Taylor about The Good Samaritan and he was very much interested; that she would go over plaintiff's script and projection of Characters and would like to have him make up a presentation of the whole show so she could take it and the audition script to New York the next month when she went on her Caribbean cruise; that she asked, "What do you think of asking *** \$350 a week for the scripts; that will give us each \$175. Is that O. K. with you? We will go 50-50 on the deal." That he replied that he would make the presentation and put the script in final form, and that "\$175 to start is O. K. with me, and I presume that whatever happens we will go 50-50 on the deal," and she said "That is right"; that they were to make out the outline as to what was to go into each day's episode or broadcast and then he was to write the scripts and send them to her for editing; that he was also to do the promotion work relating to merchandise given away on the program in exchange for soap wrappers, etc. (this was also part of his work with N. B. C.); that she said it would be all right with her to put his name under a nom de plume on the fly-leaf of the presentation with herself, and he replied, "For the benefit of any sales possibilities that may exist, let's confine it to your name"; that she made no changes in the script; that he prepared the presentation, using material from the outline of the show given him in March (the only written material ever furnished him by defendant) in writing the conclusion or summing-up of the presentation; that he paid about \$100 for the art work on the presentation for which he never was reimbursed; that defendant objected to the presentation, saying "it is too elaborate. It is not at all like me or what I would do. I thought there would be just a

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little typewritten presentation"; that just before the audition for the client on December 2nd Taylor told him that the presentation was a "honey," and "It is the Bible around which our entire sales is built." In January 1938, in writing defendant about contemplated publicity of the show in Life, Taylor said that the presentation "might make good publicity to show the way in which you analyze the future of your scripts through the presentation which you submit to an agency contemplating a new show." The presentation and the script were sent to the Agency the early part of October. About this time plaintiff suggested outlining the plot for the 2nd, 3rd, 4th and 5th scripts or episodes so that he could have them ready when defendant returned. She says she didn't see any reason for it - "just because we are sending down a presentation to an agency does not mean anything." They did outline the plots before she left Chicago in October. When in New York the representatives of the Agency suggested that defendant delay or cancel her trip if they could get some reaction from their client as to the program. She refused, saying that she did not know what the client's reaction was and would not give up the only vacation she had had in a number of years. On defendant's return to New York, around the middle of November, McMillan of the Agency advised her that they thought the idea of The Good Samaritan had a great many possibilities and that the client was interested enough to have an audition. She quoted a package production price (a change from the plan of only writing the scripts) of \$850 for a local test. She returned to Chicago November 19th and shortly thereafter received from plaintiff the four scripts he had written, and a flash, to be added to the audition script. She read the scripts quite a bit later. She says that in the first part

little typewritten presentation; that is, before the
audition for the client on November 18th and Taylor told him
that the presentation was a "copy," and it is the only
version which our entire office has. On January 1, 1934,
in writing to the client about the presentation, she said
show in this, Taylor said in the presentation that it was
good publicity to the client and that the client should
of your rights through the presentation and that you should not
an agency considering a new copy. The presentation and the
script were sent to the client the early part of October.
About this time of the presentation, Taylor told her
the 2nd, 3rd, 4th and 5th copies of the script and that he could
have them ready when the client returned. The script was
and she knew for it - that is, she was not sending them
presentation to the client and she was not sending them
outline the plot before she had the client's consent. She
in New York the representatives of the agency suggested that
defendant delay or cancel her trip to New York until they
reaction from the client as to the script. She was
saying that she did not know what the client's reaction was
and would not give up the only version she had in a number
of years. On defendant's return to New York, around the
middle of November, Taylor of the agency advised her that they
thought the idea of the Good Samaritan had a great deal of
value and that the client was interested enough to have an audition.
She quoted a package production price (a change from the plan
of only writing the script) of \$250 for a local test. She
returned to Chicago November 18th and shortly thereafter
received from plaintiff the four scripts he had written, and
a flash, to be added to the audition script. She read the
note quite a bit later. She says that in the first part

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of December she told plaintiff that they "look pretty good, though there will have to be some revision," and claims to have used portions of the four episodes. The master finds that this claim is not supported by a comparison of plaintiff's scripts and those actually broadcast. Mrs. Prys, defendant's secretary and a script writer to whom the scripts had been sent in defendant's absence, wrote plaintiff that she thought "the scripts are very good" and, "It is a very fine job." The flash was sent to the Agency. It requested a new one. Plaintiff and defendant prepared a revised flash, incorporating as its theme plaintiff's suggestion of a rich man in a car running over one of the kids at Five-points and being mobbed. The script, the same as the April audition script except for minor changes made by plaintiff, was auditioned December 2nd at the N. B. C. studios in Chicago and transmitted by wire to Proctor & Gamble at Cincinnati. Plaintiff and Mrs. Prys listened from plaintiff's office. Plaintiff says that shortly after the audition defendant rushed in, shook his hand and said, "Congratulations on the success of our audition. I am quite sure it is going to be sold." Defendant testified that this could have happened. Tentative terms agreed upon in Chicago on December 8 were accepted by the Agency by telegram December 11, and the formal written contract between defendant and the Agency was executed January 27, 1937, two days after the show had gone on the air. By this contract defendant undertook to write, produce and broadcast a radio program to be known as The Good Samaritan (the name was changed to The Guiding Light just before the first broadcast) as a package production, furnishing the complete cast, sound effects, organ, organist, etc., for five 15-minute daily broadcast, Monday to Friday inclusive each week for \$1,200 a week during the first 26 weeks and \$1,400 a week during the remaining 22 weeks of the

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contract. Plaintiff did not learn the terms of the contract until after suit was brought. Under a later revision defendant only wrote or supervised the scripts.

Defendant testified that before December 11 she told plaintiff she had settled on a local price but did not think she was getting as much for the show as she should; that she would like to pay plaintiff more for writing but the most she could pay him was around \$100 a week, and if and when increases came in the contract she would be glad to increase his pay accordingly, and that he consented. Plaintiff testified that on defendant's return from New York she told him that she had quoted a package price of \$850 a week; that he said he presumed she had figured enough in the price to take care of the amount they had agreed to charge for the scripts - \$350 a week to begin with; she said that she did not know but that it would be something like that; that after they had finished the revised flash in the latter part of November defendant asked, "What do you expect to get out of this?"; that he asked her what she meant - that they were partners; that she said the expenses were so great that she did not see where "we are going to be able to work out \$350 as a profit to be divided equally between us"; he replied that he was willing to share in the famine as well as the feast and, so long as they stuck to their agreement, whether it be great or small made very little difference; that about three days after the audition defendant said she had received word from the Agency that the show had been sold and they were to get \$850 a week for it; that around the 28th or 29th of January defendant told him she was afraid "our profit is not going to be as great as we had expected. *** I do not believe that I can work out more than \$125 or \$150 for each of us"; that he replied that if it could not be as they planned

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originally, he was willing to go ahead on the reduced return; that he was not criticizing her for the price made, but that she had not consulted him as to the price or expenses, "but we are in this thing together, so the reduced amount is all right with me"; that defendant then said there would be a \$400-a-week increase - that is, a jump from \$850 to \$1,250 a week after the first 26 weeks, and \$1,500 after the first 18 months, and "of course these additions we will split equally so it won't seem so bad"; that on February 10 defendant handed him a check for \$100 and said, "Is it all right?"; that he replied that he knew nothing about the figures, had never seen anything to show what she was getting from the Agency and could not say whether or not the check was his half of the profits; that various payments of \$100 or multiples thereof aggregating \$2,000 were made to him at irregular intervals from February 10 to and including June 23, purporting to cover the period from January 27 to June 7, which he received as covering his share of the profits during that period. Defendant denies having had the conversations testified to by plaintiff; admits that she never told plaintiff she was getting more than \$850 a week for the show, and says that she made payments to plaintiff as salary at the rate of \$100 a week for his services as her employee in writing scripts; that she had to delay the first payment until she received the first remittance from the Agency; that the last payment was made after she discharged plaintiff because he was not writing script.

Plaintiff testified that in the interval between the sale of the show and the time it was put on the air he saw defendant every three or four days and asked about writing the scripts which were to be in the hands of the Agency a week or so before the broadcast; that she put him off, saying that she did not

the broadcast; that she put him off, saying that she did not
which were to be in the hands of the agency a week or so before
every three or four days and asked about writing the script.
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Plaintiff testified that in the interval between the time
because he was not writing script.

that the last payment was made after the broadcast. Plaintiff
payment until she received the final installment from the agency;
employee in writing script; that she had to help the time
as salary at the rate of \$100 a week for his services as an
a week for the show, and that she had no right to claim
that she never told Plaintiff she was writing the script.
having had the conversations testified to by Plaintiff; that
share of the profits during the period. Plaintiff testified
from January 15 to June 7, 1935, in which she received a total
10 to and including June 7, 1935, amounting to \$1,000.00, also
\$2,000.00 were made to him at irregular intervals from January
that various payments of \$100.00 were made to him from January
not say whether or not he was writing the script or not;
anything to show that he was writing the script or not;
witnessed that he was writing the script during the period
him a check for \$100.00 on June 7, 1935, and that he had
ed it with a check of \$100.00; that on January 15, 1935, he
months, and not during the period from January 15, 1935, to
with after the first 10 days, and that he had no right to
\$100.00 a week from January 15, 1935, to June 7, 1935, and
right after the first 10 days, and that he had no right to
we are in this thing together, so that he was not writing the
she had not contacted him as to the matter of the script. That
that he was not writing the script during the period from Janu-

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have time to discuss them but would let him know; that about January 20 he again offered to write some of the scripts and she replied, "Well, the ideas have not jelled enough, and I just don't feel that I can pass them on or let you take them over." Defendant testified that plaintiff talked to her a number of times between the sale of the show and January 25, 1937, and wanted to discuss plots and prepare scripts; that it is the customary practice in writing a show of this character to prepare a daily plot ahead and then to base the story on the daily plot; that based on the tentative outline of the show, she prepared synopses of the daily episodes, blocking them out in squares about a week ahead; that she did not give any of these plots or daily squares to plaintiff nor discuss any of the daily plotting with him at any time, other than plaintiff's exhibit 18. This exhibit, prepared by plaintiff, was a blocking out of daily episodes in squares covering the daily broadcast for the first week of the show (episodes 2, 3, 4 and 5), discussed by plaintiff and defendant in the early part of October, and squares covering 15 additional episodes prepared by plaintiff while defendant was on her Caribbean cruise and at which defendant says she merely glanced; these were never discussed. Plaintiff testified, and defendant does not dispute him, that he could never get a conference with her to lay the plot; he further testified that without the plot any writing that he would do would be absolutely superfluous and idiotic; that they were to plot the thing together as they did on the audition script and then he was to write it and she would edit it or make any change she saw fit, and without collaboration on the plot there was not anything he could do without just wasting a lot of time; that he could not write a script which would fit into the program which was developed without him. The only

have time to discuss them but would let him know; and about January 20 he again offered to write some of the material and she replied, "Well, the more I have to write, the more I just don't feel that I can make time to do it for you. When over." Defendant testified that Plaintiff would be a number of times between the date of the first meeting, 1957, and agreed to discuss the case and the trial; that it is the customary practice in writing a book or article to prepare a daily plot sheet and then to have the story on the daily plot; that based on the tentative outline of the plot, the prepared synopsis of the daily episodes, which is then in spaced about a week apart; that the plot sheet and of these plots or daily episodes he submitted for Plaintiff's the daily plotting with him at any time, never then Plaintiff's exhibit 18. This exhibit, prepared by Plaintiff, was a plot sheet out of daily episodes in spaced intervals, the daily episodes for the first week of the year (January 1, 1957, to January 7, 1957), and Defendant in the early part of October, and spaces covering 18 additional episodes prepared by Plaintiff while Defendant was on her Caribbean cruise and at which Defendant says she merely glanced; these were never discussed. Plaintiff testified, and Defendant does not dispute this, that he could never get a conference with her to lay the plot; he further testified that without the plot any writing that he would do would be absolutely unworkable and illogical; that they were to plot the thing together as they did on the previous script and then he was to write it and she would edit it or make any change she saw fit, and without collaboration on the plot there was not anything he could do without just meeting a lot of time; that he could not write a script which would fit into the program which was developed without him. The only

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writing plaintiff did, except for merchandise "give aways," after November 30 when the audition script was completed by addition of the revised flash, was episodes 12 and 38, and the Circus script. Episode 12 was sent to the Agency January 21 and broadcast February 9; plaintiff says it was written to fit in with the plan of the plot; defendant eliminated the Swedish dialect in which plaintiff had written it, but made no other material change. Episode 38 was broadcast March 17; plaintiff testified that it was written at defendant's request according to the plot outlined by her; that a few days before the broadcast defendant told him that the script was fine and she surely did not have to do much to it. She admits sending him the revised script with a note attached saying "It is coming along swell. However, long speeches take too long to reach the crux of a situation. But you got something there, mister." The Circus episode was a voluntary contribution by plaintiff for use when a circus came to town. It was never used. No writing was done by plaintiff after March 15, and on March 19 defendant ceased sending him mimeographed copies of the daily scripts for the broadcasts. The last script sent him was broadcast April 1. Payments continued for practically three months after plaintiff ceased writing.

The only expression of dissatisfaction with plaintiff's work and contribution to the program made by defendant before terminating her relations with plaintiff was a complaint said to have been made when they met in California while on vacation in the latter part of March 1937 when she told plaintiff that he was not making the kind of progress she had hoped he would make. He denies this conversation. Defendant further testified that in the middle of June she called him on the phone and told him she was not getting any return for the \$100 a week she was paying him and could not retain him as a writer; that

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while he was very willing to write, he did not seem to be able to; she had not had very many contributions from him; that he had all the outlines; that she had to call a halt because she was paying out money for work she was doing; that a few days later - June 23 - she paid him \$300 covering the back-pay he had coming. Plaintiff denies this conversation but testified to a conversation in June or July, after the last payment of \$300, while driving defendant home from a dinner at the Edgewater Beach Hotel in which defendant said she was sorry the collaboration could not work out, and that he replied that defendant had suddenly decided to do all the writing and it would be only a matter of time before she would say he was not entitled to even a small share of his rights in the show because he would do none of the work; that he was ready, willing and able, as he had always been, to do the work and was going to see that he got his share; that she replied that the collaboration could not work out; that she would see that he got his money but (that she) had to go along alone. Saturday, July 24, 1937, plaintiff sent defendant by registered mail a letter dated June 22nd referring to a telephone conversation of a few days before in which defendant said definitely that he was to have no share in the show. In this letter plaintiff insisted upon his half interest in the show, saying: "You *** suggested that we collaborate on The Goog Samaritan." "You then said that you would *** ask \$350 a week for the scripts and my share would be half." "I had not been consulted about the price, even though I had done all the work up to that time (sale of the show) and had a half interest in the show." "Were we not to go on a 50-50 basis?" "I am not relinquishing my part ownership in The Guiding Light." He says this letter, written on June

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while he was very willing to write, he did not seem to be able to; who had not had very many contributions from him; that he had all the outlines; that he had to call a halt because he was paying out money for work that was being done; that a few days later - June 22 - the work was still going on; the back-pay behind earned, finally decided this conversation but resulted in a conversation in June on July, after the last payment of \$500, while the work was still going on; dinner at the Edgewater Beach hotel in which the defendant said who was sorry the collaboration could not go on, and that he replied that defendant had suddenly decided to do all the writing and it would be only a matter of time before the would say he was not entitled to even a small share of his rights in the show because he would do none of the work; that he was ready, willing and able, as he had always been, to do the work and was going to see that he got his share; that the replied that the collaboration could not work out; that the would see that he got his money but (that one) had to go along alone. Saturday, July 24, 1937, plaintiff sent defendant by registered mail a letter dated June 22nd referring to a telephone conversation of a few days before in which defendant said definitely that he was to have no share in the show. In this letter plaintiff insisted upon his half interest in the show, saying: "You *** agreed that we collaborate on the Good Samaritan." "You then said that you would *** ask \$350 a week for the script and my share would be half." "I had not been consulted about the price, even though I had done all the work up to that time (sale of the show) and had a half interest in the show." "There was not to go on a 50-50 basis?" "I am not relinquishing my part ownership in the Good Samaritan." He says this letter, written on June

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22nd, was withheld when the payment of \$300 was made the next day, and mailed later when no further payments were made. It was received and receipted for Monday, July 26. Defendant says she read it that day but never discussed it with plaintiff at any time, and never knew until suit was brought that plaintiff claimed an interest in the show. She was at the N. B. C. studio that morning, playing the role of Mother Moran in Today's Children. Plaintiff testified that after the broadcast she came into his office and they discussed the letter. Plaintiff testified without contradiction that after his talk with defendant, Taylor of the Agency came into plaintiff's office; that plaintiff told Taylor of the partnership and that he had written the audition script and the presentation and had done 99 per cent of the work up to the time it got the interest of the Agency; that defendant then decided to push him out of the picture and had refused to discuss the plot with him or permit him to write; that Taylor replied that he could never fathom plaintiff's connection with the show; that he, Taylor, wanted to talk about the plot of the show; that they had sensed down in New York that it had taken on^a different flavor and that he had told defendant just that morning that they would have to go back to the melting-pot idea which they liked so well in the beginning and which characters seemed to have dropped out of the plot, and she didn't like it very much. Plaintiff and defendant agree that following an appointment made by plaintiff they had dinner at the Kungsholm restaurant on Rush street in March 1938, where they discussed the breaking of their relations, but give a different account of the discussion. This was their last conversation. The last communication between them was plaintiff's letter of

was withheld when the payment of \$50 was made the next day, and mailed later when no further payments were made. It was received and retained for some time. Defendant says she read it that day but never discussed it with Plaintiff at any time, and never made any effort to bring that Plaintiff's claim in interest in the matter. She was at the N. Y. Studio that morning, taking the role of "Lillian" in "Today's Children". Plaintiff's letter to her after the broadcast was sent into his office and was forwarded to the letter. Plaintiff retained without consideration that after his talk with defendant, Taylor on the agency and also Plaintiff's office; that Plaintiff told Taylor of the picture ship and that he had written the motion picture and the presentation and had done 15 per cent of the work up to the time it got the interest of the agency; that Taylor then decided to push him out of the picture and had refused to discuss the plot with him or permit him to write; that Taylor replied that he could never discuss Plaintiff's conversation with the show; that he, Taylor, wanted to talk about the plot of the show; that they had turned down in New York that it was taken on different flavor and that he had told defendant that that morning that they would have to go back to the writing-room as which they liked so well in the beginning and which characters seemed to have dropped out of the plot, and she didn't like it very much. Plaintiff and defendant agree that following an appointment made by Plaintiff they had dinner at the Knickerbocker restaurant on Rusk street in March 1938, where they discussed the breaking of their relations, but give a different account of the discussion. This was their last conversation. The last communication between them was Plaintiff's letter of

December 7, 1938 to defendant in California. This letter related to the broadcast of December 5th and said: "If you need any further assistance in the development of my plot or in the writing of scripts, I, as you know and have always known, am always ready, willing, and able to do my share of the work in connection with our show 'The Guiding Light.' In spite of the fact that you have acted most dishonorably, I wish you - just for old-time's sake - a most pleasant holiday season." Defendant did not reply.

This extended recital of the evidence is necessary because the primary question presented is one of fact, the decision of which rests largely upon which of the two principal opposing witnesses - plaintiff and defendant - is the more credible. The master reported: "After observing the manner and conduct of the plaintiff and the defendant while appearing as witnesses, and considering all of the circumstances which go to make up the logic of the events in question, I have concluded that the testimony of the plaintiff is to be accepted over that of the defendant. A major factor in arriving at this conclusion was the manner in which the plaintiff survived a searching and brilliantly prepared line of cross-examination. Several of the findings which follow in this report are predicated in whole or in part on the above conclusion." In Kasakowski v. Bagdon, 369 Ill. 252, 258, where the trial court overruled the master's report, the court said: "While the rule is that the master's findings on controverted facts do not carry the weight of a jury verdict in a suit where trial by jury is a matter of right, yet such findings are advisory (Stasch v. Stasch, 355 Ill. 581) and thus are entitled to much consideration. The chancellor, in this case, had no better opportunity to judge the credibility

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of witnesses than has this court on appeal, and all the facts are open for our consideration." Kasbohm v. Miller, 366 Ill. 484; McKey v. McKean, 384 Ill. 112, 124; Osgood v. Zieve, 388 Ill. 226, 235. In Groome v. Freyn Engineering Co., 374 Ill. 113, 129, where findings of the master as to fraud, etc., approved by the trial court were attacked on appeal, the court said: "It is sufficient to say that upon these questions the master who heard the witnesses was in a better position to determine the weight and credibility of the evidence. There is evidence to support his findings and they will not be disturbed on review."

The credibility of the defendant is impeached. That portion of defendant's sworn answer that the presentation and audition script upon which the sale of the show was made "were so inartificially prepared that it was necessary for defendant to make so many revisions in the same as to amount to a totally new and different presentation and audition script," is shown by the greater weight of evidence, including the defendant's testimony, to be false. Her persistence in testifying that she knew nothing of plaintiff's claim of a half interest in the show until someone told her the present suit had been brought is indefensible in the face of her admission of having received and read plaintiff's letter dated June 22, 1937, and undisputed proof of her receipt of plaintiff's letter of December 7, 1938. Her testimony that she had not replied to or discussed with plaintiff his letter dated June 22, 1937 and received July 26th is strange, if true, but most likely untrue. Particularly so if, as defendant now contends, there was never any thought of a partnership between them. She was in the N. B. C. offices and studios almost daily, and it had been her custom to drop into plaintiff's office after the broadcasts of Today's Children. The charges in the letter directly attacking

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her claim to the sole ownership of the show and asserting plaintiff's half interest would hardly have been ignored by her. Of less importance is her statement that the social security tax on the \$2,000 she claims to have paid plaintiff as her employee was paid by the Agency. Her counsel stipulated that no tax was paid by anyone on these payments, although defendant was paying social security taxes on payments to 2 or 3 other employees.

Defendant's counsel attack plaintiff's testimony, charging that on cross-examination he confessed "We never had a definite agreement. She never stated definitely what I was to get out of it.*** I cannot swear to the accuracy of any of this. *** and thereby abandoned the claim of an express fifty-fifty partnership which he swore to in his complaint and on direct examination; that this confession was never repudiated by plaintiff. The two statements separated by asterisks in the quotation are separated by 344 pages in the record, relate to different subjects and do not support defendant's contention. The first statement was in answer to an involved question in which the payment of specific sums were incorporated and plaintiff's answer is in harmony with his testimony that he and defendant were to share equally in the profits and that defendant never definitely stated the precise sum he was to get until the payment of \$100 on February 10, 1937, the date given in the question put to plaintiff. On her direct examination defendant in testifying about employing plaintiff did not fix a definite sum to be paid to him. She says she told him "The most I can pay is around \$100." Plaintiff always insisted that the money paid by defendant was received by him as one-half of the profits of the show, and not as payment of a fixed salary or wage. The express agreement to share profits

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equally was not involved in the question plaintiff was answering. The second statement was made in the course of an extended cross-examination in which defendant's counsel was attempting to compel plaintiff to give his conversations with defendant in reverse order -- that is, to give the last statement of the conversation and each preceding statement in order back to the first statement of the conversation. Plaintiff having answered several times that he could give the gist of the conversations but did not know whether he could give them in the right order, said, "I cannot swear to the accuracy of any of this (the order of the statements). It is an utterly unnatural way of thinking." With his conclusion we agree.

Defendant's counsel further contend that it is unreasonable to believe that defendant, with her experience and standing as a writer of radio script, would have entered into a partnership agreement with plaintiff. In determining this question we must not be dazzled by the later success of the defendant. It must be determined in the light of the situation existing in 1936, uninfluenced by subsequent events. Smith v. Farmers' State Bank, 390 Ill. 374, pp. 379 -380. In 1936 defendant had produced and had been connected with one successful day-time serial -- Today's Children. She had yet to write her second successful serial. It was uncertain whether she would ever write it. Her attempts with Black Earth and Dear Diary had not succeeded. Up to the time she suggested submitting The Good Samaritan to the Agency as she passed through New York on her vacation trip, not a "nibble of any kind" had been received on the show, and when she asked plaintiff to prepare the presentation she told him "We do not have any client that I know of, but anyway it is a shot in the dark." She reluctantly sat down with plaintiff to plot episodes 2, 3, 4 and 5 before leaving for New York because she did not know

equally was not involved in the matter. Plaintiff was answering. The second statement was made in the course of an extended cross-examination in which defendant's counsel was attempting to compel Plaintiff to give his conversation with defendant in reverse order - first to give a full statement of the conversation and then proceeding statement in order back to the first statement of the conversation. Plaintiff having answered several times that he could give a full statement of the conversation but did not want to do so, Plaintiff gave them in the right or reverse order, "I was not aware of the accuracy of any of this (the order of the statement). It is an utterly untrustworthy way of thinking." After this conclusion we agree.

Defendant's counsel further stated that it is unreasonable to believe that defendant, in her experience and standing as a writer of radio scripts, would have entered into a partnership agreement with Plaintiff, in maintaining this question we must not be misled by the facts and circumstances of the defendant. It must be determined in the light of the situation existing in 1935, which seemed to be a difficult situation. Smith v. Tamm, 280 Ill. 374, 94 S.W.2d 502. In 1935 defendant had produced and had been contacted with one successful day-time serial - Robert's Willows. She had yet to write her second successful serial. It was essential for her to write her second successful serial. She would even write it. Her attempts with Robert's Willows and Dear Henry had not succeeded. Up to the time she suggested submitting The Good Samaritan to the Agency as she passed through New York on her vacation trip, not a "ripple of any kind" had been received on the show, and when she asked Plaintiff to prepare the presentation she told him "we do not have any clients that I know of, but anyway it is a shot in the dark." The Plaintiff sat down with Plaintiff to list episodes 5, 6, 7, and 8 before leaving for New York because she did not know

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any reason for it - "just because we are sending down a presentation to an agency does not mean anything." When in New York, on her way to South America, she refused to cancel or delay her trip because she did not know what reaction Procter & Gamble would have to the show.

The agreement as to which plaintiff testified, was made during a period of uncertainty as to the future of the program, at a time when defendant had little interest and little faith in it. All the writing, the presentation and audition script upon which the sale of the show was based was to be and in fact was done by plaintiff. The agreement contemplated only the writing of the scripts, not a package production in which plaintiff was to do all the writing and defendant was merely to edit or supervise his work after they had outlined the plot. The agreement to share the profits equally was only what the law implies, in the absence of an express agreement, when two or more collaborate in producing a literary work. Maurel v. Smith, 220 Fed. 195, affirmed in 271 Fed. 211, 215. The same rule applies in joint adventures (30 Am. Jur., Joint Adventures, sec. 32), and partnerships (40 Am. Jur., Partnership, sec. 113; Uniform Partnership Act, sec. 16.) The trial court and defendant's counsel cite Wicker's arrangement for a one-fifth interest in Today's Children as an argument against plaintiff sharing equally with defendant in the collaboration and production of The Guiding Light. We do not know from the record Wicker's background or qualifications for writingscripts, the nature or extent of his collaboration or when it began. The first acknowledgment of Wicker's interest was made almost two years after the show had been on the air. Manifestly a person might accept a smaller percentage of the profits in collaborating in writing scripts for an established and successful show than in embarking on the promotion and

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production of a new and unproved program where the risk is great and success is uncertain until some time after the show is on the air. As late as February, 1937 defendant wrote the Agency, "Who knows, The Guiding Light might be in a fog by that time (November, 1937)." Another fact weakening any analogy between Wicker's arrangements and the present case is that in Today's Children, in addition to writing script, defendant took the role of the leading character in the broadcasts. Wicker did not act. In The Guiding Light neither defendant nor plaintiff were actors. Neither plaintiff's alleged inexperience nor the fact that the contract with the Agency was in the name of defendant defeats plaintiff's claim of a partnership. They are merely incidents to be considered with all the evidence. Lyon v. MacQuarrie, 115 P.2d (Cal.) 594.

Plaintiff's theory of an agreement to collaborate in producing scripts with an equal division of the profits and defendant's repudiation of the contract when the possibilities of the show became apparent, is more consistent with the evidence than defendant's theory that all work done by plaintiff prior to the sale of the show - writing the presentation (he having written or supervised the writing of several thousand; she had written none) and the audition script - was done solely for experience in writing scripts under defendant's direction on her promise to employ him if his work proved satisfactory; that after the presentation and audition script were shown to be "so inartificially prepared that it was necessary for defendant to make so many revisions in the same as to amount to a totally new and different presentation and audition script" she employed plaintiff at \$100 a week to write script and paid him for twenty weeks, during which

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necessary for defendant to take so many revisions in the
 same as to amount to a totally new and different production
 and edition script" she employed plaintiff at \$100 a week
 to write script and paid him for twenty weeks, during which

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time he produced only three scripts; that payment of salary continued three months after he had submitted his last writing; that the only protest that plaintiff "was either unable or unwilling to write scripts of satisfactory quality or quantity" made by defendant before severing her relations with him was made when they met on a vacation more than two months before she ceased paying his salary.

The record supports the findings of the master, and defendant's exceptions to his report should have been overruled. Defendant's counsel, however, argue that even assuming the truth of all the master's findings, plaintiff is not entitled to recover. It is contended by defendant that the master failed to find that plaintiff accepted defendant's offer to collaborate in writing the scripts and share the profits on an equal or fifty-fifty basis. The master expressly found that plaintiff skilfully and competently prepared the presentation and audition script which defendant requested, and that further writing of scripts and collaboration by plaintiff was prevented by defendant. The facts found constitute performance by plaintiff, and this is acceptance of defendant's offer, completing the contract. 12 Am. Jur., Contracts, sec. 42.

It is also contended that any partnership between the parties was terminable at the will of either party and that defendant's acts constituted a dissolution of the supposed partnership ending the matter "unless either of the supposed 'partners' was in possession of 'partnership property' of any value to be accounted for"; that at the time of the alleged dissolution of the partnership there was no partnership property of value. This argument ignores the literary property in the radio show The Guiding Light. Cole v. Phillips H. Lord, Inc., 28 N. Y. S.2d 404; 18 C. J. S., Copyright and Literary Property,

23.

secs. 5, 8. As said in Thanos v. Thanos, 313 Ill. 499, 506, cited by defendant: "Either the act of appellant in declaring the partnership terminated or the act of the appellee in withdrawing from the partnership business was in fact and in law a dissolution of the same. (Blake v. Sweeting, 121 Ill. 67.) Such dissolution of the partnership was not, however, its termination. It continues until the winding up of partnership affairs is completed. In a court of equity a partner who after the dissolution of the partnership carries on the business with the partnership property is liable, at the election of the other partner, to account for the profits thereof, subject to proper allowances. (Karrick v. Hannaman, 168 U. S. 328, 18 Sup. Ct. 136.)"

Another contention is that plaintiff abandoned whatever relation existed between himself and defendant and is guilty of laches. When defendant refused to make further payments plaintiff notified her by letter that he was not relinquishing his "part ownership in The Guiding Light." He brought suit within the five-year limitation period governing actions for accounting on oral contracts. Trustees of Schools v. American Surety Co., 307 Ill. App. 398, and cases cited.

It is further contended that plaintiff cannot recover as he does not come into equity with clean hands, because the alleged partnership was a violation of his obligations to N. B. C. and an attempt to "pass his novice writings off on the sponsors as those of 'the leading day time serial writer'"; that this would have been a fraud and against public policy. If the evidence supported this claim, defendant is in no position to take advantage of it. Groome v. Freyn Engineering Co., 374 Ill. 113, 124-125.

Finally it is urged that the master's findings are of no weight because the master copied verbatim the "findings"

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prepared by plaintiff's counsel, citing Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138. This point is wholly without merit and the case cited has no application. At the close of all the evidence the master asked counsel for both parties to submit suggested findings. Plaintiff's counsel submitted less than thirty. Defendant's counsel submitted 83 suggested findings in an 84-page printed brief containing references to the record and argument supporting the findings. The master, finding for the plaintiff, adopted most of his suggested findings, but not all. Criticism of the master's conduct is unwarranted.

The decree is reversed and the cause remanded with directions to overrule defendant's exceptions to the master's report and to proceed in conformity with the views expressed herein.

REVERSED AND REMANDED
WITH DIRECTIONS.

Matchett, P. J., concurs.
O'Connor, J., dissents.

prepared by Plaintiff's counsel, and the same is
in the possession of Plaintiff's counsel. The same is
and the case also is to be tried. The same is
the evidence and the parties asked to be heard on the
right to present evidence. Plaintiff's counsel
then filed a motion for summary judgment. Plaintiff's
findings in an ex-parte hearing. The court found
to the facts and conclusions of the court. The court
findings for the Plaintiff, and the court found
findings, but not the findings of the court. The
is undisputed.
The court is of the opinion that the same is
directions to the jury. The court is of the opinion
report and to proceed in conformity with the same.
herein.

W. J. O'Connell
Attorney at Law

W. J. O'Connell, Jr., Counsel
O'Connell, Jr., Counsel

43384

WILLIAM D. GORDON,
Appellant,

v.

EDWIN L. READ,
Appellant,

CARL H. BORAK and FRANK KATZ
and RUTH KATZ, Third-party
Defendants-Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant Read appeals from a judgment for \$1,400 rendered in favor of plaintiff, a real estate broker, on his claim for commissions on the sale to Frank and Ruth Katz of the Clarendon-Montrose Apartments, title to which was held by Read as trustee under a liquidating trust agreement.

In September 1943 Read listed the Clarendon-Montrose property with plaintiff, who was endeavoring to sell other property in which Read was interested; he explained that he held title to the property as trustee, that an offer of \$30,000 in cash would be considered, but that it would have to be approved by the trust managers and submitted to the holders of beneficial interests, 35 per cent of whom could reject the offer. Plaintiff, who had shown other property to Frank Katz without effecting a sale, suggested to him the purchase of the Clarendon-Montrose property; Katz was taken to the premises by an employee of plaintiff, examined the exterior of the building and the interior of several apartments; shortly after the examination of the premises with plaintiff's agent, Katz went alone to make a further examination; he was denied admission to the premises by the

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janitor, who referred him to the defendant Borak, a real estate broker who had the management of the building; Katz went to see Borak. There is a conflict in the evidence as to whether Borak advised Katz that purchase of the premises could only be effected through himself. About this time Katz advised plaintiff that he was not interested in buying the Clarendon-Montrose building or any other building at that time, and plaintiff says "That is when we dropped it."

On October 7, 1943 plaintiff advised Read by letter that he had submitted the property to Katz on September 20; that Katz and his wife had examined the premises in company with plaintiff's agent on September 27th and on the day the letter was dated Katz had called at plaintiff's office and advised plaintiff that he would make an offer on the property within a few days. Under date of October 11, 1943 Read acknowledged receipt of plaintiff's letter and stated: "I am advised by Mr. Carl H. Borak that this property was shown to Mr. Katz by him several months ago altho no sale had been consummated. This will also advise you that I cannot recognize your letter." There is no evidence to support the statement that Borak had previously shown the property to Katz. Katz testified that he first saw Borak after plaintiff's agent had shown him the premises; that he then told Borak that plaintiff had submitted the property to him. Borak testified that Katz came into his office about October 10, 1943. It does appear without contradiction that Borak owned a small number of beneficial interests in the liquidation trust; that he was active in the organization of the trust, obtaining an initial loan of \$2,500 to provide necessary funds for its organization and later procuring a \$15,000 mortgage on the premises. He managed the property under the trustee from the beginning of

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the trust. Under date of October 26, 1943 Borak submitted to Read an offer dated October 25, 1943, signed by Frank Katz and Ruth Katz, his wife, to purchase the property for \$30,000, the offer being conditioned upon the buyer's securing "a first mortgage trust deed loan of Fifteen Thousand Dollars (\$15,000) without the payment of commission therefor, said loan to be for not more than fifteen (15) years, with payments to completely amortize itself over the life of the loan, at 4 1/2% interest." By the early part of December Borak had obtained commitment for the loan of \$15,000 upon the terms stated in the offer to purchase. Thereafter, under date of December 18, 1943, an unconditional offer to purchase the premises for \$30,000 signed by Katz and his wife was submitted to Read. This offer contained the recital that "The only broker in any way involved in this offer is Carl H. Borak of 33 North LaSalle Street." Appended to the offer was an agreement signed by Borak reciting that "The undersigned, a licensed real estate broker, represents that he is the only broker interested in the foregoing offer and agrees to indemnify and save the seller harmless from claims of any other broker in connection with said offer." The purchase of the property was consummated in the early part of 1944 and the full commission of \$1,500 paid by the trust estate to Borak,

After the institution of plaintiff's action defendant Read made Borak and the purchasers of the property parties to the action, asserting his claim against the purchasers upon their representation in their offer that Borak was the only broker involved, and against Borak upon his representation that he was the only broker involved and his agreement to indemnify Read from claims of any other broker. On these claims judgment was entered in favor of the purchasers and

the trust. Under date of October 20, 1944, Bork submitted to Bork an offer dated October 1, 1944, signed by Bork, Katz and Ruth Katz, the offer, to purchase the property for \$50,000, the offer being conditioned upon the buyer's assuming "a first mortgage trust loan of fifteen thousand dollars (\$15,000) without the payment of cash down, and the loan to be for not more than fifteen (15) years, with payments to commence immediately itself over the life of the loan, at 4 1/2% interest." By the terms of Bork's offer, Bork had obtained a commitment for the loan of \$15,000 upon the terms stated in the offer to purchase. Bork's offer, under date of October 1, 1944, and upon additional offer to purchase the property for \$50,000 signed by Katz and his wife as authorized to bind. This offer contained the recital that "the only broker in any way involved in the offer to buy the property of Bork's estate is Bork's estate." Bork's offer was an offer signed by Bork's estate. The undersigned, a licensed real estate broker, represents that he is the only broker involved in the foregoing offer and agrees to indemnify and save the seller harmless from claims of any other broker in connection with said offer. The purchase of the property was consummated in the early part of 1944 and the full commission of \$1,500 paid by the trust estate to Bork.

After the institution of plaintiff's action defendant had made Bork and the purchasers of the property parties to the action, asserting his claim against the purchasers upon their representation in their offer that Bork was the only broker involved, and against Bork upon his representation that he was the only broker involved and his agreement to indemnify them from claims of any other broker. On these claims judgment was entered in favor of the purchasers and

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against Borak for the sum of \$1,400. No appeal was taken.

Plaintiff was authorized by Read to find a purchaser for the premises; he submitted the property to Frank and Ruth Katz, who subsequently purchased it; he promptly notified Read of his submission of the property to the purchasers, and Read, taking the false position that Borak (his associate in the trust) had previously shown the property to the purchasers, refused to recognize plaintiff in the transaction and paid the commission to Borak. Plaintiff is, nevertheless, entitled to his commission. Rigdon v. More, 226 Ill. 382; Hafner v. Herren, 165 Ill. 242; Wilson v. Mason, 153 Ill. 504; Cowan v. Day, 156 Ill. App. 105; Fifer v. Lewis, 183 Ill. App. 349.

The judgment is affirmed.

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Matchett, P. J., and O'Connor, J., concur.

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43396

In Re: ESTATE OF EDWARD J. O'HARE,
Deceased.

GEORGE REMUS,
Claimant-Appellant,

v.

THE NORTHERN TRUST COMPANY,
Executor of the Estate of Edward
J. O'Hare, Deceased,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

320 A 596

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Claimant (Remus) appeals from a judgment of the trial court denying his claim against the estate of the deceased (O'Hare).

The original claim for \$196,700 filed in the Probate court of Cook county was based upon an alleged verbal account stated July 31, 1923 in the sum of \$208,200 on which \$11,500 was paid. This claim was denied in the Probate court. On appeal taken to the Circuit court - the trial there before the court without a jury - the claim was again denied. On appeal to this court (313 Ill. App. (abst.) 71) the judgment was reversed because of an erroneous ruling in respect to evidence offered by claimant. On remandment a second trial was had in the Circuit court before another trial judge without a jury, resulting in a similar judgment denying the claim.

On the last trial Remus filed an amended statement of claim for \$199,200, balance due on an account stated in the sum of \$208,200 "reduced to writing in an agreement signed by Edward J. O'Hare (the deceased) on July 31, 1923." The alleged original agreement has never been before the court. An alleged photostatic copy dated July 31, 1923 at St. Louis, Mo., recites an agreement of O'Hare to pay to Remus \$208,200 at the rate of \$10,000 each

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year for a period of 19 years thereafter, and \$18,200 on the 20th year from the date of the instrument without interest, and that "This agreement is evidenced by (891) eight hundred ninety one barrels of whiskey stored in the warehouse of the Jack Daniels distillery at St. Louis, Missouri, certificated for which I hereby tender said George Remus (claimant) as collateral security for said above amount of money due him. If the aforesaid amount can be paid by me before maturity I shall use my best efforts to do so."

Remus claims, and there is testimony to support the claim, that in 1925 when O'Hare was on trial in the Federal court at Indianapolis for conspiracy to violate the prohibition laws in the handling and disposition of the whiskey covered by the certificated held as collateral, O'Hare wanted the original agreement between himself and Remus in his possession until after the conspiracy case, and that Miss Watson, representing Remus, delivered it to O'Hare after endorsing on it two payments of \$2,500 each and procuring the photostatic copy of the agreement and endorsements relied upon and received in evidence in the present litigation. No witness testifies to having had or seen the original after its alleged delivery to O'Hare. A witness called by Remus testified that in 1935 Remus asked O'Hare for the original note, saying that O'Hare had promised to give it back but had not done so and that all he (Remus) had was a photostatic copy; that O'Hare replied that he had given the note to his lawyers and would try to get it, "but that photostatic copy is as good as the original between you and I."

The genuineness of the signature to the agreement is attacked. Defendant introduced the testimony of persons claiming to be familiar with O'Hare's signature who testified that the signature was not O'Hare's. A handwriting expert called by defendant stated that in his opinion the signature was a forgery. Plaintiff met this testimony with the testimony of a handwriting expert who was of the

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opinion the signature was genuine, the testimony of witnesses who claim to have seen O'Hare sign the agreement, and a witness who claimed to be familiar with O'Hare's signature and was of the opinion that the signature was genuine. Claimant also produced witnesses who testified to statements made by O'Hare respecting his obligation on the agreement and to payments made by him on account. These witnesses were long-time friends of Remus and had been associated with him in some of his various transactions. They were casual witnesses to the transactions or statements about which they testified and, with one exception, without apparent interest in the matters occurring within their sight or hearing. They were not interrogated or called upon to testify concerning these matters until a number of years thereafter. One of the witnesses testified on several of the hearings, and with these witnesses a progressive improvement in memory to meet the needs of claimant's case is noted. All the matters testified to were transactions or statements of a dead man, with none present other than the deceased, Remus and his witnesses. Testimony of this nature must be closely scrutinized. It is generally regarded with suspicion. If false it is safe perjury. As this court said in In re: Estate of Hanson, 304 Ill. App. 157, 162: "Extrajudicial admissions of a dead man are the weakest of all evidence. They cannot be contradicted. No fear of detection in false swearing impends over the witness. In most instances such testimony is scarcely worthy of consideration." To like effect are Keshner v. Keshner, 376 Ill. 354; Megrinson v. Megrinson, 367 Ill. 168; Delee v. Leahy, 278 Ill. App. 178.

There have been three trials before three different trial judges. All have denied the claim. It is true that one judgment was reversed because of the error in excluding evidence offered by Remus. The judgment now before us should not be reversed unless

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it is palpably wrong. Farley v. Mitchell, 282 Ill. App. 555; Standard Acc. Ins. Co. v. Mueller, 291 Ill. App. 56. We cannot say that the finding of the trial court is contrary to the evidence. To the layman a comparison of the signature to the agreement relied upon with the admittedly genuine signatures of O'Hare in the exhibits before us tends to support the conclusion of the handwriting expert who declared the signature in question to be a forgery. In the original claim filed in the Probate court, as amplified by order of the court for more particulars, the alleged account stated is said to be verbal. The amended statement filed on the last trial bases the account stated on the alleged agreement in evidence. Several years after the making of the alleged agreement Remus filed an affidavit with the Government in an effort to adjust his income taxes. In this affidavit he does not list this note as an asset. Objection made to the admission of this affidavit is not tenable. The affidavit did not relate to any compromise of the claim before us, and the cases cited are not applicable. Admissions against interest by a party to litigation may be received without previously examining the litigant as to such admissions. Brown v. Calumet River Ry. Co., 125 Ill. 600. In this affidavit in evidence Remus failed to list the obligation of O'Hare among his assets. When called as a witness he sought to explain the omission by saying that he then considered the obligation worthless. However, he listed as being without value the certificates for the whiskey, which he claims to have held as collateral for the note, and failed to list the worthless obligation among the losses claimed by him. We deem further recital of the testimony unnecessary.

The judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P.J., and O'Connor, J., concur.

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43410

VALENTINE KUBISZEWSKI,
Appellant,

v.

EDWARD LYNCH,
Appellee.

37 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

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MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment in a forcible detainer action in favor of the defendant, who has not followed the appeal.

It appears from the record that defendant was a month to month tenant of an apartment on the first floor at 1801 south Troy street, Chicago, belonging to plaintiff; on October 24, 1944 the Rent Director of the Office of Price Administration of the Chicago Defense-Rental Area issued to plaintiff a certificate relating to eviction authorizing him to bring action for eviction of defendant as tenant of the apartment; thereafter plaintiff served the necessary 30 day notice of termination of tenancy as of December 31, 1944, and on January 5, 1945 instituted suit for possession. On the trial, over objection of plaintiff, defendant was permitted to introduce evidence attacking the good faith of the plaintiff in asking eviction of defendant so that the premises might be occupied by plaintiff's daughter. This was error, as held by this court in Bochner v. Rosen, 326 Ill. App. 382, citing United States v. Hansen, 52 F. Supp. 693, and Jones v. Shields, 146 P.2d (Cal. App.) 735.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

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43439

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

STANLEY SUMOSKI,
Plaintiff in Error.

ERROR TO CRIMINAL COURT
COOK COUNTY.

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MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT

Defendant appeals from a judgment finding him guilty of petit larceny and sentencing him to one year in the House of Correction and to pay a fine of \$100 and no costs.

The case was tried before the court on testimony of witnesses and a stipulation as to the testimony of certain witnesses which conclusively establishes the larceny of property in the custody of the Mechanics Overall Laundry and Rental Company, named as owner of the property in the indictment. This was sufficient proof of ownership of the property, although the title thereto was in another corporation or person. People v. Fitzgerald, 297 Ill. 264; People v. Kreisler, 381 Ill. 453, 457; People v. Dunsworth, 323 Ill. App. 470, 473-4.

No objection was made to the competency of the evidence stated in the stipulation, and no right to make such objection was preserved in the stipulation. The facts incorporated therein being sufficient to establish guilt, we need not consider defendant's complaint as to the alleged error in denying his motion to suppress certain other evidence or the admission of other evidence said to have been improperly admitted. The only error we find in the record is in the finding as to the value of the property, which should have been greatly in excess of the value of \$14 found by the court. Defendant, having profited by this error, makes no objection.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

REPORT OF THE BOARD OF
DIRECTORS OF THE

STATE OF TEXAS

IN THE MATTER OF THE

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The judgment is affirmed.

ATTEST:

Notary Public for Texas, J. J. Connor.

43468

AMERICAN NATIONAL BANK & TRUST
COMPANY OF CHICAGO, as Trustee
under a trust agreement dated
May 9, 1933, known as Trust
No. 1583,

Appellee,

v.

THE NATIONAL MINERAL COMPANY,
an Illinois corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a summary judgment in the sum of \$2,292.22 entered against it in an action for rent due at the institution of suit under a written lease between plaintiff and defendant dated December 20, 1943, covering premises in the City of Chicago to be occupied solely for storage, warehouse and manufacturing purposes for a term from March 1, 1944 to February 28, 1947.

By special provision defendant lessee was given permission to make certain alterations to the front and rear entrance to the demised premises substantially in accordance with blue prints made a part of the lease by reference, the cost of such alterations not exceeding the sum of \$2,000 to be paid by plaintiff lessor. It was further provided that on or before March 15, 1944 plaintiff would place defendant in possession of a portion of the premises and in possession of the remainder of the premises on or before April 1, 1944; that rentals should be prorated and begin as to the part first occupied as of March 15, and as to the remainder April 1. Under date of March 14, 1944 plaintiff advised defendant that the first portion of the premises was ready for occupancy. On March 19th defendant acknowledged receipt of this notice,

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stated that the entrance to the premises was too small for defendant's truck and therefore plaintiff was "unable to give the possession contemplated by and necessary to comply with the lease, whether because of a mistake of fact on your part, mutual mistake or other reason," and stating that defendant was obliged to set aside the lease on the grounds stated but offering to consider a new lease upon certain alterations being made by plaintiff. As a result of negotiations a further agreement between the parties was entered into on April 18, 1944, providing that defendant "may take possession of the premises at 5050 Broadway without waiver of and without prejudice to the respective rights of The American National Bank & Trust No. 1583 and of The National Mineral Company," and defendant on that day entered into possession of the premises but made no payment of rent as provided in the lease. On June 16, 1944, without surrendering possession, defendant filed its complaint in the Superior court of Cook county seeking to have the lease declared canceled and of no effect and offering to pay the reasonable value of the premises until defendant removed from them. July 14, 1944 plaintiff instituted the present action for rent and immediately made a motion for summary judgment. Defendant charges that this motion was entered prematurely and makes certain objections to the procedure in respect to the motion. We need not consider these objections as the matter was continued from time to time and final disposition of the motion was not made until October 20, 1944, after defendant was given ample opportunity to make its defense to the motion and also apply to the Superior court for an injunction restraining this action to collect rent during the pendency of defendant's suit to cancel the lease. Defendant's application for injunction was denied. White v. Y. M. C. A., 223 Ill. 526, 530.

No question of fact is involved. Plaintiff's right to

stated that the entrance to the premises was well known to the defendant's truck and therefore plaintiff was bound to know the possession contemplated by the lease was not to be used for the purpose of a warehouse or other business, and that the defendant was obliged to use the premises for the purpose stated in the lease. Plaintiff offered a new lease on certain conditions being made by plaintiff. The new lease was made on the 15th of August, 1944, providing that defendant was to use the premises as a warehouse and not for any other purpose. Plaintiff offered to the defendant a new lease on the 15th of August, 1944, and of the 15th of August, 1944, and before that on the 15th of August, 1944, into which was inserted the new lease. Defendant made no payment of rent as provided in the lease. On the 15th of August, 1944, without any warning or notice, defendant filed a complaint in the Superior Court of Cook County, Illinois, to enforce the lease declared canceled and to recover the value of the premises until removed from them. July 14, 1944, plaintiff instituted the new action for rent and immediately made a motion for summary judgment. Defendant charges that this motion was denied and that the lease was certain objections to the proceedings in regard to the motion. He need not consider these objections as a matter was continued from time to time and final disposition of the motion was not made until October 30, 1944, after defendant was given ample opportunity to make his defense to the motion and also apply to the Superior Court for an injunction restraining this action to collect rent during the pendency of defendant's suit to cancel the lease. Defendant's application for injunction was denied. White v. Y. B. & A., 223 Ill. App. 2d, 230.

No question of fact is involved. Plaintiff's right to

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judgment is based solely upon the proposition of law, as it contends, that defendant having taken possession under the lease, it must pay the rent stipulated therein. Defendant contends that under the agreement of April 19, 1944, providing that defendant take possession without waiver of and without prejudice to the respective rights of plaintiff and defendant, it is entitled to remain in possession without payment of rent and litigate its right to cancel the lease. It is the established rule that a tenant in possession under a lease is obligated to pay the rent provided by the lease, subject however to his right to recoup in the action for rent such damages as he may have sustained by reason of the lessor's failure to comply with his covenants in the lease. Rubens v. Hill, 213 Ill. 523. Defendant does not seek to recoup any damages. Its affidavit in opposition to the summary judgment sets up its alleged right to cancel the lease and the agreement of April 19, 1944. It endeavors to cancel the lease because of impossibility of performance arising out of the illegality under the ordinances of the city of the proposed alterations which it was permitted to make, citing in support of its right to rescind because of illegality of performance, Fisher v. U. S. Fidelity & Guaranty Co., 313 Ill. App. 66. Restoration of the status quo is generally required as a condition of obtaining cancellation of an agreement. 9 Am. Jur., Cancellation of Instruments, sec. 39. The agreement of April 19, 1944 is practically meaningless. It reserves the rights of the plaintiff as well as the rights of the defendant. Among the rights of the plaintiff reserved by the agreement was the right to receive the rent stipulated in the agreement, subject only to the defendant's right to recoup.

No substantial triable issues of fact being raised by defendant's affidavit of defense, the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The second is the fact that the majority of the population is now living in the middle class. This is a result of the process of social mobility, which has been going on since the beginning of the 20th century. The third is the fact that the majority of the population is now living in the white middle class. This is a result of the process of racial integration, which has been going on since the beginning of the 20th century.

... ..

1. The first step in the investigation was to determine the exact date of the incident.

and I think the Government should find a way to get the money out of the pockets of the people and put it into the pockets of the people who need it.

to pay the next round of the loan, which

... .. of their
... .. and business over

with his coverage in the 1960s. He was a member of the
National Association of Broadcasters and the National
Broadcasting Convention.

to cancel the issue and the reasons for it.

... to ... of ...

1. The first condition is that the system must be able to handle the data. This is a prerequisite for any system that is to be used for data processing.

1. The first of these is the fact that the majority of the population of the country is engaged in agriculture, and the majority of the land is owned by a few large landowners. This is a situation which is not only unjust but also inefficient, for the large landowners are not interested in improving the land or in increasing the productivity of their tenants. The result is that the country is producing less than it is capable of producing, and the majority of the population is living in poverty.

... .. to as

[illegible]

The right to receive the next dividend after the previous one

only to the defendant's right to receive.

11-14-44

Marshall, J. L., Jr., 1950, p. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837,

42861

ESTHER HOPPE,
Appellee,

v.

YELLOW CAB COMPANY, a Corpora-
tion,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by her through the negligence of the driver of a taxicab in which she was riding as a passenger. There was a jury trial, a verdict and judgment in plaintiff's favor for \$500 and defendant appeals.

The record discloses that on April 5, 1941, plaintiff, a woman about 42 years of age, with her husband, lived at 5535 Winthrop avenue, Chicago, which street is about 1100 west. That near her home she got a taxicab to take her to her husband's place of business, which was at Loomis and Harrison streets. Loomis street runs north and south and is about 1400 west, and as the taxicab, going south, was crossing Monroe street, an east and west street, there was a collision between the cab and an automobile being driven west in Monroe street by H. A. Lathrop, whose correct name plaintiff says was Roy Lathrop. Lathrop was made a party defendant but was not served and did not appear on the trial. Plaintiff was thrown from her seat and struck her knee and shin, which were the injuries for which she sues.

There is much confusion in the record. The facts in this case are very simple but it is difficult to find out what they are from the briefs or record.

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The complaint alleged that plaintiff was riding south in a taxicab on Tripp avenue at its intersection with Monroe street but there is no evidence that the streets intersect. It was also alleged that the automobile which collided with the taxicab was being driven east in Monroe street, but the testimony of plaintiff is that it was being driven west. There is much other confusion in the record but we think it would serve no purpose to mention for we are clearly of opinion that the taxicab was being driven south in Loomis street and the collision occurred as it was crossing Monroe street.

Plaintiff testified that the taxi driver did not slow down or stop as he was about to cross Monroe street but that when the cab was at about the middle of that street the driver applied his brakes, suddenly stopped the cab and there was a collision at that time between the automobile and the cab. She was the only witness who testified on this subject. Neither the driver of the cab nor of the automobile was called and there is no explanation. We think the question whether the taxi was being driven negligently was for the jury.

Plaintiff testified she was on her way to visit her mother at Fort Dodge, Iowa; she continued on her trip after the accident; that the taxi driver asked her if she wanted him to take her to a hospital but she said "No"; that she went to Fort Dodge to visit her mother who lived there, and about 2 weeks thereafter, returned to Chicago when on May 14, 1941, Cecil M. Commans, an investigator and adjuster for the General Transportation Casualty and Surety Company, and the Yellow Cab Company, called on plaintiff at her home and asked her how the accident occurred. He testified that he wrote on a blank statement what plaintiff said at the time, from which it appears that plaintiff repeated that the driver of the taxi was not to blame, and that all she wanted from the company was the payment

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of her doctor's bill of about \$15 which was incurred at Fort Dodge. She signed a full release and statement at the time and the adjuster gave her a check for \$15, made payable to her and to Leslie Hoppe, her husband. She further testified that about 3 or 4 days afterward she went to see the adjuster at his place of business, 309 W. Jackson Boulevard. The adjuster testified she came to see him about a week or 10 days after he gave her the check, etc. They both agree that she told him her husband did not want to endorse the check and that she, at the request of the adjuster, endorsed it and turned it over to the adjuster who gave her the \$15; that she turned around to leave the office and a few minutes thereafter, returned to the adjuster's desk and gave him the \$15, which he kept.

No complaint is made by counsel for defendant that there was any variance between the allegations of the complaint and the testimony of plaintiff as to how the accident occurred, nor is there any complaint about the ruling on the evidence or the instructions of the court, which are not abstracted. But counsel for defendant contend the court should have sustained defendant's motion for a directed verdict "at the close of all the evidence and for judgment notwithstanding the Verdict."

The court overruled the defendant's motion made at the close of plaintiff's evidence and afterward defendant put in its evidence. That motion was then out of the case. We spelled out the correct rule of procedure in such circumstances in Popadowski v. Bergaman, 304 Ill. App. 422. And since we think there was sufficient evidence on the question of defendant's negligence for the case to go to the jury it follows that the contentions made by counsel cannot be sustained. We are further of opinion we would not be warranted in holding that the verdict was against the manifest weight of the evidence. It was approved by the court and in these circumstances there was

of her doctor's bill of about \$15 which was incurred at Fort Dodge. She signed a bill release and statement at the time and the adjuster gave her a check for \$15, made payable to her and to Leslie Moore, her husband. She further testified that about 3 or 4 days afterwards she went to see the adjuster at his place of business, 504 E. Jackson Boulevard. The adjuster testified she came to see him about a week or 10 days after he gave her the check, etc. They both agree that she told him her husband did not want to endorse the check and that she, at the request of the adjuster, endorsed it and turned it over to the adjuster who gave her the \$15; that she turned around to leave the office and a few minutes thereafter, returned to the adjuster's desk and gave him the \$15, which he kept. No complaint is made by counsel for the plaintiff that there was any variance between the testimony of the plaintiff and the testimony of plaintiff as to how the accident occurred, nor is there any complaint about the ruling on the evidence on the instructions of the court, which are not objected. But counsel for defendant contend the court should have sustained defendant's motion for a directed verdict that the close of all the evidence and the judgment notwithstanding the verdict. The court overruled the defendant's motion made at the close of plaintiff's evidence as an award defendant but in its evidence. That motion was made out of the case. We applied out the correct rule of procedure in each circumstance in Togobowski v. Ferguson, 504 Ill. App. 431. And since we think there was sufficient evidence on the question of defendant's negligence for the case to go to the jury it follows that the contention made by counsel cannot be sustained. We are further of opinion we would not be warranted in holding that the verdict was against the manifest weight of the evidence. It was approved by the court and in these circumstances there was

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no error in this respect. Read v. Cummings, 324 Ill. App. 607.

Counsel for defendant further contend that since plaintiff executed a release of all her claims in consideration for the check for \$15, the verdict and judgment cannot stand. They say that the testimony of the adjuster and plaintiff clearly shows that she understood she was signing a release; that she was a woman of experience in the same line of business having been secretary, stenographer and bookkeeper and handled releases for an insurance company for many years and that her testimony, that she did not know she was signing a release, is not worthy of belief. There is considerable merit to this contention but upon a consideration of the entire record it appears without contradiction that the \$15 was returned and retained by the adjuster and we are unable to say that the judgment ought not to stand.

A further contention is that the judgment is excessive but we think there is no merit in this because the evidence is that plaintiff's leg was badly skinned; that she suffered considerable pain, called on the doctor at Fort Dodge 8 times and upon her return to Chicago was treated by Dr. John P. O'Connell May 16, 1941. He testified and described the injury to her left leg; that there was "an abraded area of about 2 1/2 inches in length and 3/4 to an inch in breadth which had an unhealthy scab, on removal of which there was evidence of infection. There was inflammation and swelling. I removed the unhealthy scab" and plaintiff was under his care until Labor Day; that from May to July 15 he saw her once or possibly twice a week; that "There is still a scar 2 inches in length and 3/4 or a half inch in breadth, which is positively permanent and adheres to the underlying tissues. *** that there is an impaired motion in the skin," etc., and that his charge was \$75.

77-0587

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The judgment of the Superior court of Cook county
is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and Niemeyer, J., concur.

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There is a lot of work to be done in the future

Hamilton

1791

There is a lot of work to be done in the future

In the Appellate Court of the
State of Illinois
Second District

May Term, A. D. 1945.

326 I.A. 636

Alfretta Dickinson,
Plaintiff-Appellant,

v.

Rockford Van Orman Hotel Company,
Defendant-Appellee.

Appeal from the
Circuit Court of
Winnebago County

Dove, P. J.

Appellant sued appellee in the circuit court of Winnebago County to recover damages for a fall allegedly caused by slipping on the marble stairway in the lobby of the hotel. The trial was by a jury, a motion by appellee for a directed verdict at the close of the plaintiff's case was denied, and ruling on a like motion at the close of all the testimony was reserved. The jury returned a verdict for \$7500.00 in favor of appellant, and judgment was entered on the verdict. On appellee's motion, the judgment was set aside, judgment notwithstanding the verdict was entered, appellee's motion for a new trial, pursuant to Rule 22 of our Supreme Court, was granted, and this appeal followed.

The cause was tried on allegations of common law negligence in not providing hand rails on the stairway and an adequate system of lighting thereof, and in maintaining the stairway in a smooth and slippery condition. Appellee denied any negligence in those respects, and alleged that appellant was wearing high heeled shoes and that the fall was caused by catching her heel on the edge of the landing.

Under Rule 22 of the Supreme Court, above mentioned, the

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$\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$

— 194 —

6. *Staphylococcus aureus* 1000

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6. The 1974 survey, based on 1000 calls to 1000 randomly

ruling on the motion for a new trial does not become effective unless and until the order granting the motion for judgment notwithstanding the verdict be reversed, vacated or set aside. Such a motion, like a motion for a directed verdict, presents only a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of the plaintiff's case. If there is any evidence tending to sustain every element of the plaintiff's case necessary to be proved to sustain the cause of action, it is immaterial upon which side the evidence is introduced. No contradictory evidence or other evidence of any kind or character will, in such case, justify a directed verdict or a judgment notwithstanding the verdict, except uncontradicted evidence of facts consistent with every fact which the evidence for the plaintiff tends to prove, but showing affirmatively a complete defense. If there is in the record evidence which, standing alone, tends to prove the material allegations of the complaint, a motion for a directed ~~material allegations~~ verdict, or for judgment notwithstanding the verdict, should be denied, even though, upon the entire record, the evidence may preponderate against the party in opposition to the motion, so that a verdict in his favor could not stand when tested by a motion for a new trial. (Merlo v. Public Service Company of Northern Illinois, 381 Ill. 300, 311-312.)

The uncontradicted facts shown by the evidence are as follows: Appellee had been operating the hotel since 1934. Appellant was a paying guest at a banquet of the Rockford Business and Professional Womens' Association on the evening of October 13, 1942, in the Crystal Room on the second or mezzanine floor of the hotel, and was injured by a fall on the stairway while coming downstairs after the banquet. The stairway is

on the north side of the lobby, and consists of 5 sections. Section 1 leads down from the mezzanine floor, at or near the entrance to the Crystal Room, to a landing on the north wall of the lobby, approximately 6 feet below the level of the mezzanine floor. From this landing, on down, the stairway is of the open type. Sections 2 and 3, each consisting of 12 and 14 steps, respectively, lead down from this landing at right angles, section 2 descending westerly, and section 3 easterly, each to another landing about 5 feet above the level of the lobby floor. Sections 4 and 5 each consist of 6 steps below the landings, respectively descending southerly at right angles from the last mentioned landings to the lobby floor, section 4 being to the west and section 5 to the east. The stairs and landings are constructed of marble, and the marble extends up about 4 feet on the north wall. The lowest flight of the steps is about $5\frac{1}{2}$ feet wide, with steps between 8 and 9 inches high. There was a hand rail along the south side of each of the long flights and along the south side of the landing from which they lead down. The photographs in evidence show that there was a banister along the outside of each of the lower landings, with marble posts about 1 foot square at the south end, extending up about a foot above the banister. The lowest flights had marble banisters on each side, about 1 foot thick, with horizontal tops, the end nearest to the landing being about one foot above it, and the outer end about 6 feet above the lobby floor, with a cap along the top about an inch thick and extending about an inch over the sides. The lobby is a large room, and was lighted by 4 chandeliers, and a row of lights around the walls 3 or 4 feet from the ceiling.

Appellant was about 33 years old at the time of the accident, was 5 feet 5 inches tall, weighed 175 pounds, and had on shoes with leather soles and heels, and a street length

On the north side of the road, a small stream flows
from a hillside. The water is clear and cold.
The stream flows into a small pond. The pond is
surrounded by trees and bushes. The water in the
pond is still and reflects the surrounding
landscape. The trees are mostly deciduous and
have green leaves. The bushes are low and
dense. The sky is blue with a few white
clouds. The sun is shining brightly. The
air is fresh and cool. The overall scene is
peaceful and serene.

dress 16 inches from the floor. After the banquet, in company with others, she went down the first section of the stairway, turned left and went down the north side of the west section of the long flight, and after reaching the second landing, proceeded south along and about a foot from the west side thereof, to the top of the last flight leading down to the lobby. As she started down this last flight, she fell and landed on the floor of the lobby.

She testified that as she came down the stairs, the marble sides and stairs were very shiny and slick, and there was a certain glare, caused by the light; that she had just taken her foot down to the first step below the landing, which would be on the right side, when she slipped, reaching to the right for something to save herself, because she was nearest to the right wall, put her hand on the projection which extends south from the landing on the west side of that flight of stairs, but was not able to hold onto that side and that there was no railing there; that she could not say exactly where the top of the partition that is on the west side of the steps came on her body, but that she would have to bend over to touch it, and that it was below the ends of her finger tips as they would be at her side; that after she fell, the next thing she knew was when she came to on the floor of the lobby; that the heels of her shoes were of average height, not higher than 2 1/2 inches; that just before she fell she had proceeded down the stairs slowly; that at the time she stepped down onto the first step where she fell she had been facing south and was looking straight down at the stairs. On cross examination she testified that no one was ahead of her; that when she came to the stairway leading down to the lobby she noticed that the steps were very glaring and slippery; that before leaving the

mezzanine floor she went to the elevator, but there was a crowd around there, and that she felt that she was younger and there were older people who could take the elevator and that she started down the stairs; that she first noticed the glary, and slippery condition when she was on the long flight of stairs and had come down the first 4 or 5 steps on the right side, which would be the north wall, where there was no railing on that side, and when she noticed that the steps were glary and slippery she went slowly; that she noticed the railing on the other side of the long flight at that time; that at the time she slipped she was not more than a foot from the west wall; that ^{as} her foot slipped forward, she reached for something to save herself, and nothing being there she pitched forward, and did not know what position she came down in, and when she came to she was stretched out on the floor at the bottom of the stairs; that there was a large light fixture hanging from the lobby, the type of glass of which she did not know, floor lamps in the lobby and lights at the room clerk's section and at the desk; and that she did not recall any lights around the lobby 4 or 5 feet from the ceiling. On being recalled in her own behalf she testified that she had not been in the hotel since some time in 1941, and did not know whether she had used the stairs on that occasion, but her best recollection was that she had not, and that prior thereto she had not been in the hotel since 1940.

Appellant's aunt, one of the persons present at the banquet, testified that she and many of the others went down the stairs; that appellant was one or two steps ahead of her, and both were walking very slowly; that as she stepped down from the middle landing there was a glare of lights, and just as appellant stepped off the landing onto the next step her feet seemed to slip from under her, and described appellant's

fall substantially the same as appellant, saying that she pitched headlong down the stairs; that her feet went from under her and she went forward; that the surface of the extensions on each side of the stairs were very glossy and white and slippery, and the stairs were of the same material and were very glossy and glary. On cross examination she said that the first thing she noticed about the accident was that appellant's right foot slid forward; that there was a glare from the ceiling of the lobby; and that appellant's heel was less than 2 inches high.

Three other ladies who attended the banquet and came down the stairs, testified that the steps were slick, and glary from the lights in the lobby, and that the condition existed all the way down the stairs. One of them testified that the steps were smooth and highly polished; that she knew the difference between polished and unpolished marble, and that the steps were polished, and very glary, and made it hard to know how to step - to watch very carefully. She and appellant's aunt each testified to having previously been there several times, and that the conditions were the same, the aunt stating that the condition had existed more than a year.

Briefly summarized, the testimony of these five witnesses, including appellant, is to the effect that the steps and walls of the stairway were very smooth and slippery, and that there was a glare of light on them from the lobby lights, which conditions had existed more than a year, and made it difficult to know how to step, and necessary to watch carefully; that on that account appellant was proceeding very slowly and slipped on one of the steps, reached for something to save herself, but there was no hand rail, and she fell down the stairs. Under the above testimony, standing alone, and considered in its aspect most favorable to appellant, without considering any contradictory evidence, we do not think that

THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

WASHINGTON, D. C. 20250

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as a matter of law there was a total failure of any evidence tending to prove the two necessary elements of ordinary care on her part and negligence on the part of the defendant. Under the rule in the Merlo case, supra, we are of the opinion that it was error to grant the motion for judgment notwithstanding the verdict; and the judgment notwithstanding the verdict is accordingly reversed. (Thomas v. Buchanan, 357 Ill. 270, 278; Reed v. Lyford, 311 Ill. App. 486; Miller v. Russell, 302 Ill. App. 165).

This calls for a consideration of the granting of appellee's motion for a new trial, three of the grounds of which are: that appellant was guilty of contributory negligence; that the verdict is against the manifest weight of the evidence, and that the court erred in the giving of instructions, all of which were sustained by the trial court, and are urged here by appellee. On considering the granting of the motion for a new trial, we may consider contradictory evidence, weigh the evidences, and inquire into its preponderance, as indicated in the Merlo case, supra, and, of course, consider the errors urged to the instructions to the jury.

As to the question of contributory negligence, appellant testified that she saw the alleged slippery condition of the stairs and the alleged glare of the lights when she started down the first few steps of the long flight, and three of her witnesses testified that those conditions existed all the way down the stairway. The law charges a person with the duty of seeing that which is clearly visible and within the range of vision. (Reed v. Lyford, 311 Ill. App. 486). She also testified that she noticed the hand rail on the south side of the long flight. Nevertheless, she proceeded down the north side thereof, where there was no hand rail, and proceeded to the place where she fell, wearing shoes which her own testimony indicates had leather heels about 2 1/2 inches high. No reason is apparent or

suggested why she did not cross over to the south side and use the hand rail there. While she did not fall on that flight, ordinary care under the conditions which she claims existed, would dictate that she use the hand rail. She further testified that when she reached the landing and was about to take her step down to the last flight she realized that there was no protection there, other than the solid wall, evidently meaning the marble banister on the west side of the last flight. Where one has knowledge of a dangerous condition, he cannot rely upon a presumption that the place is safe, as he could where he had no such knowledge. (City of East Dubuque v. Burhyte, 173 Ill. 553, 558; City of Spring Valley v. Gavin, 132 Ill. 232.) Cases where the plaintiff had no knowledge of a dangerous condition have no application here. The ordinary care required from appellant under the circumstances shown was care commensurate with the danger of which she knew. (City Water Works v. Lane, 122 Ill. App. 427; City of Flora, for use, etc., v. Bryden, 300 Ill. App. 1; City of Spring Valley v. Gavin, 81 Ill. App. 456.)

Appellee's special service officer testified that just before appellant fell she was walking just the same as anyone else would, down the stairs, and that when she stepped down from the landing, her heel caught; that the heel slipped down onto the edge of the landing, and then she stumbled or tripped; that she put her hand out to recover herself and fell forward down the stairs; and that from the point where she started to fall, (which would be the landing) the banister was considerably lower than her hips, and to reach for it she would have to lean down somewhat. Appellant and her aunt also testified that she fell forward. Although appellant was recalled as a witness, we find no place in the abstract where she denied that her heel caught. As suggested by appellee, the law of physics indicates that if a person's foot slips on a smooth surface, while going forward, the result would be that the

person would fall backward, but if her heel caught on a step, it would tend to throw her forward. It is to be observed that reaching for the banister is not shown to be the cause of appellant's leaning forward, because she reached for it after she started to fall. No reason is suggested why she could not have taken hold of the post at the south west corner of the landing when she started to step down onto the step below.

On the question of the alleged negligence of appellee, its special service officer testified that there were light fixtures hanging from the ceiling of the lobby, with metal places in the fixtures at intervals that cannot be seen through, the glass portion being of frosted glass, and that the fixtures contained no clear glass; that there was a row of lights around the lobby wall 3 or 4 feet below the ceiling, with 40 watt frosted glass bulbs of a reddish or sun tint; that the steps were dusty at the time of the accident, but were washed each night with a cleansing soap and water; and that there was no effect of the lights on the steps except lighting them. It is not claimed by appellant that there was any foreign substance on them at the time she fell, which might have contributed to the fall.

The night clerk of the hotel testified that the steps were of a light brown color, and that he did not notice any effect of the lights on them. Another witness, whose office had been on the ground floor of the hotel for 7 years, testified the steps were of a buff color; that he had gone up and down the stairs many times after dark when the lights were on, and had never noticed anything particularly different between the night and the day lighting; that the stairs had a honed finish, and not a polished surface like the sides of the hotel. While he said he did not know anything about the condition of the stairs

on the night of the accident, other testimony in the record shows that their condition was the same as it had been for a long time previously, and at the time of the trial. A monument dealer, of 24 years experience, testified that he examined the steps; that they were of a honed finish, and that polished marble is the slickest type. One of appellant's witnesses above mentioned, testified that the lights were on in the lobby but they were rather dim.

Under the rule in the *Merlog* case, *supra*, the testimony found in the record required the trial court to submit the issues in this case to the jury, but in our opinion the preponderance of the evidence shows that appellant's fall was caused by her heel catching on the edge of the landing, and that at the time of and just before the accident, she was not exercising that degree of ordinary care required of her by the circumstances which she claims existed. The preponderance of the evidence also shows that the steps were not dangerously slippery and that the lobby lights did not make a glare which contributed to appellant's fall. The trial court correctly held that the verdict was against the manifest weight of the evidence on the issues of due care on the part of appellant, and negligence on the part of appellee.

The sixth instruction given is based on liability because of no hand rails, balustrades or guards were on either side of the section of the stairs where plaintiff fell. The testimony on both sides shows, without any contradiction, that there were marble balustrades there, and the issue was only as to their availability or efficiency. The instruction should not have been given.

The eighth instruction is to the effect that if the hotel was not provided with an adequate system of lighting, and

if the failure to provide the stairway with adequate lighting was negligence, that then the jury should find the defendant guilty. The real complaint of appellant is that the lighting was too strong, and caused a glare or reflection on the stairs. Jurors do not have an opportunity to examine dictionaries for definitions of terms used in instructions, and ordinarily would consider the language used as referring to an insufficient light. The instruction directs a verdict and is not cured by other given instructions. It should have more clearly defined the issue on the question. Appellant's claim that appellee waived criticism of the instruction, because its 11th instruction is subject to a similar vice, is untenable.

Because of our conclusions it is unnecessary to discuss other matters urged by appellee. The order granting a new trial is affirmed, and the cause is remanded.

Judgment notwithstanding the verdict reversed.

Order granting new trial affirmed and cause remanded.

NO. 10025

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February
MAY TERM, A. D. 1945

JESSE L. STRAUSS,
Appellant,

vs.

CORNELIUS SMYTH, et al.,

On appeal of
JESSE L. STRAUSS,
Appellant

Appeal from
Circuit Court
Du Page County

Honorable
William C. Knott,
Judge Presiding

~~Mr. Justice Bristow delivered the Opinion of the Court.~~

Appellant signed a note dated August 20, 1926. Time of payment of the note was extended several times by agreement. A proceeding in Attachment and Garnishment was instituted August 4, 1943. This was admitted to be 9 to 10 months after the expiration of 10 years after the date the action accrued.

The Defendants relied upon the ten year Statute of Limitations. To this defense the Plaintiff replied that the Defendants had resided out of the State of Illinois for such time that on the date this action was instituted, the ten year period had not elapsed.

The Circuit Court entered judgment, finding the issue for the Defendants and discharged the garnishee. From this judgment, appeal has been taken to this court.

The only point in controversy is whether the running of the ten years Statute of Limitations was tolled because the Defendants had departed from and resided out of the State after the cause of action had accrued. The

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Statute of Illinois entitled Limitations, Ch. 86, Sec. 19, provides "The time of his absence is not part of the time limited for the commencement of the action." Loebell vs. Williams, 255 Ill. App. 489, 490.

Both parties cite and rely upon the case of Pells vs. Snell, 130 Ill. 379. This case, in construing the meaning of the word "reside," which was introduced into this Limitation Statute by the Act of 1872, defined the meaning of the word in the following language, at page 384-385: "There seems however to be a substantial agreement that residence means a fixed and permanent abode or dwelling-place, at least for the time being, as contradistinguished from a mere temporary locality of existence *** We would not be understood as adopting the doctrine *** to the extent of holding that there must be an actual change of the party's domicile, in the strict legal sense of that word, *** all we intend to hold being, that he must acquire a fixed and permanent abode or dwelling place out of this State, at least for the time being."

Appellees cite one other case, only, viz: Gilbert's Estate, 311 Ill. App. 28. The Gilbert's Estate case is in regard to a claim for a child's award under the Administration Act. The Appellate Court, there, at page 36, held that in considering the application for an award, the meaning intended by the Administration Act of "residing" is to be interpreted by the strict legal concept of the word "domicile." The holding of the Supreme Court, however, in the case of Pells vs. Snell, Supra, is that strict proof of domicile without the State is not required to be made, to establish that a defendant "Resided out of the State," under the Limitation Act.

The evidence introduced on the trial is quite meager. It consisted of a letter; an unemployment compensation card; written extensions of maturity dates of the note; stipulations in regard to a foreclosure proceeding of a mortgage securing the note as non-residents with addresses at 747 N. E. 1st Street, Miami, Florida, in which foreclosure there was a deficiency judgment in rem; and brief testimony of Cornelius M. Smyth, as an adverse witness.

Questions and answers in the examination of Smyth were as follows:

"Where do you live?" "I live at 2252 Washington Blvd., Chicago, Illinois."

"How long have you lived there?" "I lived there since last November."

"Where did you live before that?" "Before that I lived down in Virginia."

"How long did you live in Virginia?" "About a year and a half." "Whereabouts in Virginia were you?" "Around Portsmouth."

The witness further testified that he was in Florida first, around '38; that he was a mechanic and there was no work in that line; that his wife did a little laundry work; and that 147 First Street was his wife's address. When asked in regard to the letter, he testified he did not write or sign it, and did not know his wife's handwriting. When pressed several times as to whether he had ordered or authorized the letter sent to Mr. Greenebaum, he said "I have no recollection of signing that letter, that is my card." And again pressed with the question, "And you didn't order it written or authorize anybody to write it or to send this?", referring to the card, he evaded the question and answered, "That is my card." He said he went to Florida again around the beginning of '40; that he got no work, that his wife did a little, that she was sick and that it was too hot for her in Portsmouth. The witness was then asked, "Where did you move from, to go to Portsmouth?" He answered, "I moved from here and went down to Miami." He said that was in '42. He was next asked "How long did you stay in Miami?" He replied, "I didn't stay in Miami, I went to Portsmouth." He stated that before going to Portsmouth, he was in Miami probably a month or six weeks.

The unemployment card shows several payments in 1939. The letter was addressed to Mr. Greenebaum in reply to a letter concerning the real estate described in the mortgage. The letter stated the property had always been an expense and worry, that the few dollars received from rents may have kept the writer and his wife from charity. It said, "I enclose one of my cards where I received 7.50 per week while in Chic last year. If you can collect 1000 on that kind of income O.K."

It impresses us that if the witness had not authorized that letter to be written, he was obligated to so state instead of evasively answering. The above is all the material part of his testimony. The inquiry ~~being~~ made of him was whether he had departed from this State and resided outside of this State. The witness had lived in Chicago since November after the attachment suit had been instituted. Before his return to Chicago he stated that he had "lived" in Portsmouth, Virginia, for a year and a half, moving there from Chicago, and went down to Miami in 1942, and after a month or six weeks went to Portsmouth, where he stated he had lived for one and one-half years.

The word "live" is defined in various Webster's dictionaries as to reside, dwell, abide, stay, as to live in a foreign land. If a person is asked where he lives, that, in common parlance, is asking him where he resides. If a person intends to impart the fact that he went from Chicago to Miami for a temporary sojourn, he would not say that he "moved" from Chicago to Miami and from there to Portsmouth. In common parlance to "move" is to make a change of residence. Ordinary language is to be understood in its plain ordinary meaning. If a person intended to indicate that he was temporarily down in Virginia, he would not answer: Before that I lived down in Virginia about a year and a half. In answering that he had moved from Florida to Portsmouth, and had lived in Portsmouth for a year and a half, the implication can only be that the residence there was a fixed permanent abode or dwelling place, for at least the time being, which in this case was for a year and a half.

When the above testimony is considered in light of the holding in the case of Pells vs. Snell Supra, we are compelled to hold that the Statute of Limitations was tolled for such a length of time that Plaintiff's ^{cause} ~~course~~ of action was not barred.

It is impossible to find an example of a

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"The above is all I have at present to report to your Commission and I am, Sir, very respectfully,
Your obedient servant,
J. H. P.

Enclosed are two copies of a letter from me to the Hon. Secy. of the Navy dated 10th March 1879.
I am, Sir, very respectfully,
Yours obedient servant,
J. H. P.

So, while he was out, that first night, between 11 and midnight, he was watching the parade.

14. The removal of the "and" in the title of the bill is suggested. The bill is titled "The Interstate Commerce Commission Act" and the title of the bill is "The Interstate Commerce Commission Act".

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the had "live" recordings; it was for a long time, however, before

There is no such thing as a free lunch or any other such thing, or any other

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b. After Air Chief of Staff [redacted] at 10:00 AM, he r[edacted] over boxes at

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to make a copy of

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if you have a high opinion of his character, it will be of great value to you.

Let's go on to the next step in the process of creating a new product.

2025 RELEASE UNDER E.O. 14176

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the case of Kelly as well as Shell (more so), there is a possibility of a "leak" or "outlet" of information.

Working for you, and it's not a job, it's a calling. And that's what we're looking for.

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It follows that the trial court erred in finding the issues for the Defendants, and in discharging the garnishee. This case should be and is reversed, with directions to the trial court to find the issues for the Plaintiff; to enter proper judgment for Plaintiff; reinstate the garnishee, and to proceed in compliance with the Attachment and Garnishment Act.

Reversed and Remanded with Directions.

to the fact that the trial was held in the presence of the jury.

It is also to be noted that the trial was held in the presence of the jury.

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Gen. No. 10034.

Agenda No. 10.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A. D. 1945.

ANNA L. BARNES, JAMES T. GILRUTH,
MAGGIE A. HARRAH, HANNAH H.
MULLEN, KATE GILRUTH LUDWIG,
RUTH E. MCKENZIE, JOHN MCKENZIE,
Jr., DONALD D. MCKENZIE and
HARRIET E. TILDEN,

Plaintiffs-Appellants,

vs.

THE ILLINOIS NATIONAL BANK &
TRUST CO. OF ROCKFORD, as Trustee,
a Corporation, ALBERT G. GILRUTH,
MAURICE T. GILRUTH, LAURA VOLSTEAD
LOMEN, HARRIET K. STUCKEY, VERA T.
SHANKLAND, ANITA J. KANNAUGH, CHARLES
F. ROOD, and CONSTANCE FISHER GIBSON,
Defendants-Appellees.

Appeal from
Circuit Court
Winnebago County.

WOLFE,-- J.

Andrew Gilruth and his wife, Elsie F. Gilruth, created a trust, the income derived therefrom was to be paid to them during lifetime, and at their death to be distributed to certain designated persons. Later the trust agreement was amended. The donors were to receive the income the same as provided in the original trust agreement, and at the death of the survivor of the donors, the proceeds were to be distributed to certain nephews and nieces of the donors. Andrew Gilruth died Jan. 3, 1944, and his wife, Elsie F. Gilruth, died Feb. 25, 1944.

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2.

A dispute arose as to how the trust funds should be distributed. The plaintiff, Anna L. Barnes and eight others, filed their bill in equity in the Circuit Court of Winnebago County, against eight other nephews and nieces for the construction of the amendment to the trust agreement. The plaintiffs claimed the personal property, (worth about seventy thousand dollars,) should be distributed among the nephews and nieces per capita, under the terms of the said amendment, thereby giving to each of the seventeen nieces and nephews an undivided one-seventeenth interest in the estate. The defendants claimed a division per stirpes, giving them from one-eighth to one-sixteenth of the property, depending upon the number of children of certain named brothers and sisters. The trial court declared that the proper interpretation of the clause of the trust in question, provided for a per stirpes division and entered a decree accordingly. It is from this decree that an appeal has been prosecuted.

The trust agreement provides that after the death of the donors, all funeral expenses etc., taxes and costs of administration of the trust shall be fully paid, and then continues: "(b) And the remainder of said trust estate shall be distributed in equal parts between them unto such of the following nephews, nieces and grandnieces of the Donors as shall be living at the time of the death of the survivor of said Donors, to-wit:

"The children of Peter Gilruth a deceased brother of said Donor Andrew Gilruth.

THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

WASHINGTON, D. C. 20250

TO: THE SECRETARY OF THE INTERIOR

FROM: THE DIRECTOR, BUREAU OF LAND MANAGEMENT

SUBJECT: [Illegible]

DATE: [Illegible]

RE: [Illegible]

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2. [Illegible]

3. [Illegible]

4. [Illegible]

5. [Illegible]

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16. [Illegible]

17. [Illegible]

18. [Illegible]

19. [Illegible]

20. [Illegible]

3.

"The children of Alexander C. Gilruth, brother of said Donor Andrew Gilruth.

"The children of Kate Gilruth McKenzie a deceased sister of said Donor Andrew Gilruth.

"The children of William O. Gilruth, brother of said Donor Andrew Gilruth.

"The daughter of Helen Gilruth Volstead a deceased sister of said Donor Andrew Gilruth.

"The children of Lawrence Gilruth, brother of said Donor Andrew Gilruth.

"The daughter and granddaughters of Alice F. Kosier a sister of said Donor Elsie F. Gilruth to-wit: Harriet Stuckey, Louise Stuckey and Constance Belle Stuckey.

"The children of Ella F. Tinker a sister of said Donor Elsie F. Gilruth.

"The son and granddaughter of Mary F. Rood a sister of said Donor Elsie F. Gilruth to-wit: Charles Rood and Dorothy Josephine Hecker.

"The daughter of Arthur E. Fisher a brother of said Donor Elsie F. Gilruth to-wit: Constance Fisher Gibson."

The sole question presented on this appeal is the proper construction to be given to the first paragraph of Section b of the trust agreement. There is no hard and fast rule that the Court can use in construing this agreement, but we must give it the construction that ^{is} intended by the language used, by the donors at the time the trust agreement was created.

4.

This Court, in the case of the First National Bank of Chicago vs. Cherrier, reported in 311 Ill. App., 214 reviewed many cases relative to the construction of a will containing similar language to this trust agreement. The rule in construing written instruments or trust agreements is the same as is in wills. We must give each and every part of the language used, its usual and customary meaning. It will be observed that the language used is that the trust estate, "shall be distributed in equal parts between them unto such of the following nephews, nieces and grandnieces of the donors." A review of the numerous cases cited by both appellants and appellees would serve no useful purpose, as most of them have been commented on by this Court in the case of First National Bank vs. Cherrier, supra. We had a similar question presented to us in Johnson vs. Johnson, 317 Ill. App. 91, and we held under the language used in these two cases, that it was the intention of the testator to have a per capita rather than a per stirpes distribution.

It is our conclusion that the language used in this trust agreement indicated that the donors intended a per capita distribution among the nephews, nieces and grandnieces and not as per stirpes. Therefore, the decree of the trial court is hereby reversed, and the cause remanded.

Reversed and cause remanded.

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